2020 WL 4092109

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

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Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Donald J. **MCCLELLAND**, Appellant

No. 2 WAP 2018
|
Argued: October 24, 2018
|
Decided: July 21, 2020

Synopsis

Background: Defendant was charged with indecent assault, indecent exposure, and corruption of minors. The Court of Common Pleas, Erie County, Criminal Division, No. CP–25–CR–0003575–2015, John Garhart, J., denied defendant's application for pretrial writ of habeas corpus, in which defendant had asserted that hearsay evidence alone was insufficient to establish prima facie case to bind defendant over for trial. Defendant filed interlocutory appeal. The Superior Court, No. 633 WDA 2016, Bowes, J., affirmed, 165 A.3d 19. Defendant appealed.

Holdings: The Supreme Court, 2 WAP 2018, Dougherty, J., held that:

[1] Hearsay evidence alone was insufficient to establish prima facie case at preliminary hearing; disapproving ***Commonwealth*** *v. Ricker*, 120 A.3d 349;

[2] Supreme Court's holding in ***Commonwealth*** *ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, that hearsay evidence alone was insufficient to establish prima facie case at preliminary hearing was binding, precedential authority, even though nominally a plurality decision;

[3] criminal rule governing preliminary hearing, providing that "hearsay ... may establish the elements of any offense" at preliminary hearing, could not be construed to mean that hearsay alone was sufficient to establish prima facie case at preliminary hearing, contrary to *Verbonitz*; and

[4] **Commonwealth's** use of hearsay evidence alone to establish prima facie case at preliminary violated due process.

Reversed.

West Headnotes (23)

[1] **Criminal Law**

Hearsay evidence alone is insufficient to establish a prima facie case at a preliminary hearing; disapproving ***Commonwealth*** *v. Ricker*, 120 A.3d 349.

[2] **Constitutional Law**

The government may not deprive individuals of life, liberty, or property without due process, including, inter alia, adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case. U.S. Const. Amend. 14.

[3] **Courts**

Plurality opinions, by definition, establish no binding precedent for future cases.

[4] **Courts**

The "stare decisis 'narrowest grounds of agreement' doctrine," treats a case as binding authority on the narrowest of grounds upon which a majority of the Court agree on both a result and its supporting rationale.

[5] **Habeas Corpus**

Ordinarily, an appellate court will review a grant or denial of a petition for writ of habeas corpus for abuse of discretion, but for questions of law, the standard of review is de novo, and the scope of review is plenary.

[6] Habeas Corpus

An order denying or granting a pretrial writ of habeas corpus is interlocutory.

[7] Criminal Law

Supreme Court would not consider **Commonwealth's** claim that superior court erred in granting interlocutory review from denial of pretrial writ of habeas corpus, in which defendant had asserted that hearsay testimony alone at preliminary was insufficient to establish prima facie case, where issue whether interlocutory appeal was permissible was beyond scope of issue upon which allocatur was granted.

[8] Courts

Supreme Court's holding in ***Commonwealth*** *ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, that hearsay evidence alone was insufficient to establish prima facie case at preliminary hearing was binding, precedential authority, even though it was nominally a plurality opinion, where four members of Court signed onto lead opinion, based on finding that prima facie case based solely on hearsay alone would violate due process, and one justice reached same conclusion in concurring opinion, albeit based on analysis that was slightly different than analysis employed by plurality, thus resulting in five-member majority of Court holding that hearsay alone was insufficient to establish prima facie case at preliminary hearing. U.S. Const. Amend. 14.

[9] Courts

Courts apply the Statutory Construction Act when interpreting the Rules of Criminal Procedure. 1 Pa. Cons. Stat. Ann. § 1501 et seq.

[10] Statutes

A statute is “ambiguous,” thus requiring resort to canons of statutory construction to consider matters beyond statutory language itself, when there are at least two reasonable interpretations of the text. 1 Pa. Cons. Stat. Ann. § 1921(c).

[11] Courts

Criminal rule providing that “hearsay ... may establish the elements of any offense” was ambiguous as to whether rule provided that hearsay alone was sufficient to establish prima facie case at preliminary hearing, contrary to holding in ***Commonwealth*** *ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, that hearsay evidence alone was insufficient to establish prima facie case at preliminary hearing, thus warranting resort to canons of statutory construction; both **Commonwealth** and defendant provided reasonable, alternative interpretations of “any,” in this context. Pa. R. Crim. P. 542(E).

[12] Courts

When interpreting a rule of procedure, the court will read the sections of the rule together, and will construe them to give effect to all of the rule’s provisions. 1 Pa. Cons. Stat. Ann. § 1921(a).

[13] Courts

Criminal rule governing preliminary hearing, providing that “hearsay ... may establish the elements of any offense” at preliminary hearing, could not be construed to mean that hearsay alone was sufficient to establish prima facie case at preliminary hearing, contrary to Supreme Court's holding in ***Commonwealth*** *ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, that hearsay evidence alone was insufficient to establish prima facie case at preliminary hearing; scope of term “any” in context of rule was limited by first sentence of rule that hearsay “as provided by law” would be considered in determining whether prima facie case was established, and there was no indication in rule of intent to overrule *Verbonitz*. Pa. R. Crim. P. 542(E).

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[14] **Statutes**

Some meaning must be ascribed to every word in a statute or rule, and there is a presumption that disfavors interpreting language as mere surplusage. 1 Pa. Cons. Stat. Ann. § 1922(2).

[15] **Criminal Law**

Hearsay is generally inadmissible in legal proceedings unless it falls under a recognized exception. Pa. R. Evid. 801(c).

[16] **Statutes**

Courts are bound to interpret a statute, where possible, in a way that comports with the Constitution's terms.

[17] **Statutes**

When a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the court's duty is to adopt the latter.

[18] **Criminal Law**

The primary reason for the preliminary hearing is to protect an individual's right against unlawful arrest and detention.

[19] **Criminal Law**

The preliminary hearing seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection.

[20] **Criminal Law**

The full panoply of trial rights do not apply at a preliminary hearing, but the hearing is nevertheless a critical stage of the proceedings, and is intended to be more than a mere formality. Pa. R. Crim. P. 542.

[21] **Criminal Law**

Due process clearly attaches at a preliminary hearing. U.S. Const. Amend. 14; Pa. R. Crim. P. 542.

[22] **Criminal Law**

Commonwealth's use of hearsay evidence alone, specifically, testimony of state trooper regarding what he heard during child victim's interview with child specialist, to establish prima facie case at preliminary hearing to bind over defendant for trial on charges for indecent assault, indecent exposure, and corruption of minor, violated due process; **Commonwealth** relied solely and exclusively on evidence that would be inadmissible at trial. U.S. Const. Amend. 14; Pa. R. Crim. P. 542.

[23] **Double Jeopardy**

Dismissal of charges and discharge of the accused for failure to establish a prima facie case at the preliminary hearing is an interlocutory order that does not implicate double jeopardy concerns. U.S. Const. Amend. 5; Pa. R. Crim. P. 542.

Appeal from the Order of the Superior Court entered May 26, 2017 at No. 633 WDA 2016, affirming the Order of the Court of Common Pleas of Erie County entered April 4, 2016 at No. CP-25-CR-0003575-2015. Garhart, John, Judge

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

OPINION

JUSTICE DOUGHERTY

I. Background

1** In ***Commonwealth *ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990) (plurality) ("*Verbonitz*"), a five-Justice majority of this Court held hearsay evidence alone is insufficient to establish a *prima facie* case at a preliminary hearing. In the present case, a divided Superior Court recognized the *Verbonitz* holding, but did not follow it, despite acknowledging "the facts of *Verbonitz* are virtually indistinguishable from the case *sub judice*." ***Commonwealth*** *v.* ***McClelland***, 165 A.3d 19, 31 (Pa. Super. 2017). The Superior Court articulated five reasons for its departure from *Verbonitz*: (1) the *Verbonitz* Court did not agree on a single rationale to support its holding; (2) the Superior Court, in ***Commonwealth*** *v. Ricker*, 120 A.3d 349 (Pa. Super. 2015) ("*Ricker I*"), *appeal dismissed as improvidently granted*, 642 Pa. 367, 170 A.3d 494 (2017) (*per curiam*) ("*Ricker II*"), rejected the position of the three-Justice *Verbonitz* plurality opining the presentation of hearsay violates confrontation rights; (3) the two-Justice *Verbonitz* minority relied on a substantive due process analysis contradicted by *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality); (4) *Verbonitz* was decided before the 2013 amendments to Pa.R.Crim.P. 542(E); and (5) there was no procedural due process violation here.

We accepted review of the following issue:

> [W]hether the Superior Court panel failed to properly apply and follow the legal precedent set forth in ***Commonwealth*** *ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172, 174-76 (1990) in which five (5) Justices held that "fundamental due process requires that no adjudication be based solely on hearsay evidence."

Commonwealth *v.* ***McClelland***, 645 Pa. 167, 179 A.3d 2 (2018) (*per curiam*).

[1] Upon careful review, we hold the Superior Court erred to the extent it concluded hearsay evidence alone is sufficient to establish a *prima facie* case at a preliminary hearing. Accordingly, we reverse the Superior Court's decision in this matter and disapprove the Superior Court's prior decision in *Ricker I*, which similarly concluded hearsay evidence alone is sufficient to establish a *prima facie* case at a preliminary hearing.

A. *Verbonitz*

In *Verbonitz*, the defendant (Buchanan) was arrested and charged with statutory rape, corruption of a minor and endangering the welfare of a child. At Buchanan's preliminary hearing, the seven-year-old female victim did not testify. Over defense objection, the **Commonwealth** presented the investigating officer who recounted what the victim told him about what Buchanan had allegedly done to her. On the basis of this hearsay alone, District Justice Edward Verbonitz determined a *prima facie* case had been established and bound the matter over for trial. Buchanan's subsequent writ of *habeas corpus* was denied by the trial court, the Superior Court denied Buchanan's petition for review, and this Court granted allowance of appeal. The issue upon which we granted review was whether hearsay evidence alone is sufficient to establish a *prima facie* case.

This Court reversed in a plurality decision. *Verbonitz*, 581 A.2d at 175. Justice Larsen wrote the lead opinion, joined by Justice Zappala and Justice Papadakos, which concluded the **Commonwealth** failed to establish a *prima facie* case because it relied on inadmissible hearsay rather than legally competent evidence. *Id.* at 174. The lead opinion also reasoned Buchanan's right to confront the witnesses against him, guaranteed by the Pennsylvania Constitution, was violated when he was bound over for trial solely on the basis of hearsay testimony. *Id.* at 174-75. Justice Flaherty wrote a concurring opinion, joined by Justice Cappy, which agreed hearsay evidence alone is insufficient to establish a *prima facie* case, but deemed this conclusion "to be a requirement of due process." *Id.* at 175 (Flaherty, J., concurring). In Justice Flaherty's view, deciding the matter on due process grounds

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made it unnecessary for the Court to discuss a defendant's confrontation rights. *Id.* at 176. Justice Flaherty explained, "[i]t is sufficient to hold that a *prima facie* case cannot be established at a preliminary hearing solely on the basis of hearsay testimony." *Id.* (emphasis omitted).

***2** Accordingly, although *Verbonitz* was a plurality decision, a five-Justice majority of the Court concluded the presentation of hearsay evidence, without more, is insufficient to establish a *prima facie* case at a preliminary hearing. The five-Justice majority also agreed, in determining hearsay alone was insufficient to establish a *prima facie* case, that "fundamental due process requires that no adjudication be based solely on hearsay evidence." *Id.* at 174 (Larsen, J., lead opinion); *id.* at 176 (Flaherty, J., concurring). [1]

B. Pennsylvania Rule of Criminal Procedure 542(E)

Paragraph (E) and the comments thereto were first promulgated by Order of January 27, 2011, and were amended by Order of April 25, 2013. [2] Initially, Paragraph (E) provided:

> (E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E) (2011 version). At that time, the comment to the rule explained:

> Paragraph (E) was added to the rule in 2011 to clarify that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements enumerated in paragraph (E). That enumeration is not comprehensive and hearsay is admissible to establish other matters as well. The presence of witnesses to establish these elements is not required at the preliminary hearing. *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

Pa.R.Crim.P. 542(E), cmt. (2011 version).

***3** In 2013, the second sentence of Paragraph (E) was amended, and the rule currently reads as follows:

> (E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, **including, but not limited to, those** requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E) (amending language emphasized). Concurrently, the comment to Paragraph (E) was also amended as follows:

> Paragraph (E) was ~~added to the rule~~ **amended** in ~~2011~~ **2013** to ~~clarify~~ **reiterate** that traditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a *prima facie* case. *See* the Pennsylvania Rules of Evidence generally, but in

> particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements **of any offense.** ~~enumerated in Paragraph (E). That enumeration is not comprehensive and hearsay is admissible to establish other matters as well.~~ The presence of witnesses to establish these elements is not required at the preliminary hearing. ***But compare Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (Pa. 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a *prima facie* case).** *See also* Rule 1003 concerning preliminary hearings in Philadelphia Municipal Court.

Pa.R.Crim.P. 542 (E), cmt. (deletions shown by strikethrough, additions in bold).

C. *Ricker*

On July 2, 2014, Pennsylvania State Troopers Michael Trotta and Dana Gingerich were dispatched to David Edward Ricker's residence to investigate reports of a disturbance. Ricker engaged Trooper Trotta in an exchange of gunfire, witnessed by Trooper Gingerich. Trooper Trotta and Ricker shot each other multiple times, but each survived. Ricker was arrested and charged with attempted murder, assault of a law enforcement officer and aggravated assault. At Ricker's preliminary hearing, neither trooper testified. Instead, the lead investigator, Douglas A. Kelley, testified regarding his investigation of the charges and played an audiotape of his interview with Trooper Trotta for the court. Ricker objected to the use of this hearsay evidence and requested a continuance to call Trooper Trotta and Trooper Gingerich on his behalf. The court overruled the objection, denied the request for a continuance, and bound the matter over for trial.

Ricker filed a pre-trial writ of *habeas corpus*. Therein, he argued it was improper for the court to conclude a *prima facie* case was established based only on hearsay evidence. The writ was denied and the Superior Court permitted Ricker's interlocutory appeal. The Superior Court subsequently affirmed the order of the trial court. The panel first noted, although some non-hearsay evidence was presented at Ricker's preliminary hearing, "none of that evidence was sufficient to establish the elements of the crimes charged." *Ricker I*, 120 A.3d at 356. The panel found "the evidence used to meet the material elements of the crimes charged came from the taped statement of Trooper Trotta[,]" and thus, "hearsay alone was used to prove a *prima facie* case[.]" *Id.* The Superior Court further held "Rule 542(E) is not in conflict with any binding precedent." *Id.* at 357. The court held if hearsay evidence can establish one or more elements of a crime, "it follows that, under the rule, it is sufficient to meet **all** of the elements." *Id.* (emphasis added). Thus, the court concluded the rule allows "hearsay evidence alone to establish a *prima facie* case." *Id.* [3]

***4** Noting its conclusion did not resolve the case, the court considered Ricker's claim that the preliminary hearing procedure violated his confrontation rights under the United States and Pennsylvania Constitutions. The court reviewed "the historical underpinnings of the preliminary hearing, the reasons for the creation of the Pennsylvania and federal confrontation clauses, and the original public meaning of the respective confrontation clauses," and ultimately concluded it could find no "binding precedent that constitutionally mandates an accused be afforded the opportunity to confront and cross-examine a witness against him at a preliminary hearing based on the federal or state confrontation clause." *Id.* at 362-63. Additionally, the court noted Ricker "has not alleged that his due process rights were infringed[.]" *Id.* at 355.

Regarding *Verbonitz*, the court correctly observed "a majority of justices agreed that hearsay evidence alone was insufficient to establish a *prima facie* case at a preliminary hearing." *Id*. at 360. The court then noted, "[t]hree justices based their rationale on a constitutional confrontation right, whereas two justices grounded their decision on due process." *Id.* Acknowledging "[t]he comment to Rule 542 recognizes the tension between the rule and *Verbonitz*[,]" the panel nevertheless determined *Verbonitz* "is not binding and is valuable only insofar as its rationale can be found persuasive." *Id.* at 361.

This Court initially granted allowance of appeal in *Ricker* to consider whether "a defendant does not have a state and federal constitutional right to confront the witness against him at a preliminary hearing" and whether "a *prima facie* case may be proven by the **Commonwealth** through hearsay evidence alone[?]" ***Commonwealth*** *v. Ricker*, 635 Pa. 255, 135 A.3d

175 (2016) (*per curiam*). Ultimately, however, as noted, this Court dismissed the appeal as improvidently granted. *Ricker II*, 170 A.3d at 494.

D. *McClelland*

The present appeal arises out of a criminal complaint filed by State Trooper Christopher Wingard, which accused appellant, Donald J. **McClelland**, of committing indecent assault, indecent exposure and corruption of minors against A.T., an eight-year-old child. Specifically, the complaint provided that, on August 3, 2015, A.T.'s parents reported to State Police that A.T. told them **McClelland** touched her face with his penis several months earlier. A.T. later provided additional details about the incident during an interview with a Children's Advocacy Center specialist, which led to the criminal charges. Relevant to the present appeal, the **Commonwealth** called Trooper Wingard as its sole witness at the preliminary hearing. Specifically, Trooper Wingard explained that he personally witnessed A.T.'s interview with the child specialist via a video link, and he recounted the contents of the interview to the magistrate, who bound the charges over for trial. **McClelland** filed a motion seeking a writ of *habeas corpus*, arguing that allowing the case to proceed to trial based solely on hearsay evidence violated his rights to confrontation and due process under the Pennsylvania and United States Constitutions. The trial court denied the motion, and **McClelland** filed an interlocutory appeal to the Superior Court, which that court permitted.[4]

The Superior Court affirmed. ***McClelland***, 165 A.3d at 33. The court initially noted *Ricker* held the text of Rule 542(E) permits hearsay evidence to establish "any" element of an offense during a preliminary hearing and the rule does not violate a criminal defendant's state or federal constitutional right to confront witnesses. *Id.* at 22. The court explained *Ricker* left unresolved the question of "whether notions of due process would require a different result." *Id.* In addressing that issue, the court first considered the threshold question of whether due process protections apply to preliminary hearings, given that preliminary hearings are purely statutory in nature. The court observed, although there is no constitutional right to a preliminary hearing, the **Commonwealth** elected to act in this field by amending Article I, Section 10 of the Pennsylvania Constitution to permit prosecutions to be initiated by the filing of criminal informations, and 42 Pa.C.S. § 8931(b) later provided the statutory authorization giving effect to the amendment. The court noted these actions prompted our Court to promulgate "rules governing the initiation of criminal charges, including Rule 542 and its hearsay provision," and triggered the application of due process protections to the procedures implementing the statutory right to a preliminary hearing. *Id.* at 26.

***5** Next, noting appellant did not specify whether he was raising a procedural or a substantive due process claim, the court considered each type of due process and found substantive due process to be inapplicable, requiring the claim to be analyzed under the rubric of procedural due process. Specifically, the court emphasized that substantive due process under the Fourteenth Amendment to the United States Constitution " 'requires state criminal trials to provide defendants with protections implicit in the concept of ordered liberty.' " *Id.* at 27, *quoting Danforth v. Minnesota*, 552 U.S. 264, 270, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (emphasis omitted). As the United States Constitution does not require the United States government to hold a preliminary hearing for criminal defendants, the court reasoned the right to a preliminary hearing was not "implicit in the concept of ordered liberty," and, thus, it concluded substantive due process does not apply. *Id.* at 28, *citing Albright*, *supra* (majority of the Court finding no substantive due process right to be free from criminal prosecution except upon probable cause).

[2] Having determined the "appeal sounds in procedural due process[,]" the court next examined whether the procedures afforded to appellant in connection with his preliminary hearing were sufficient. *Id.* at 29. In so doing, the court noted the government may not deprive individuals of life, liberty, or property without due process, including, *inter alia*, " 'adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case.' " *Id.*, *quoting* ***Commonwealth*** *v. Turner*, 622 Pa. 318, 80 A.3d 754, 764 (2013). The court observed appellant "failed to specify what interest is at stake[,]" but construed his argument as alleging "the supplied procedure is 'fundamentally inadequate to vindicate' his rule-based right to confront" the witnesses against him "since the **Commonwealth** can elect to render it meaningless" by relying solely on the presentation of hearsay evidence. *Id.* at 29-30. The court went on to reject this argument, emphasizing that, in reality, appellant's concern centered on his inability to test witness credibility, which the court opined is irrelevant at a preliminary hearing because cross-examination does not enhance the reliability of the *prima facie* determination.

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Moreover, the court mused, even assuming the trial court erred in admitting the hearsay evidence, the error would be irrelevant if appellant were found guilty beyond a reasonable doubt at trial, and it would not lead to a permanent loss of liberty if he were acquitted. Accordingly, the court concluded appellant's procedural due process rights were not violated, as he failed to demonstrate that defendants subjected to a preliminary hearing are entitled to procedural due process protections beyond notice, the opportunity to be heard, and the chance to defend themselves before a fair and impartial jury, all of which were provided in this case.

The court also addressed appellant's argument based upon Justice Flaherty's concurring opinion in *Verbonitz*, which opined the hearsay statement of a police officer was insufficient by itself to establish a *prima facie* case because it violated notions of due process. The court interpreted Justice Flaherty's concurrence as expressing a view that "due process requires an adversarial probable cause determination in order to hold a person for trial," which the court characterized as sounding in substantive due process. ***McClelland***, 165 A.3d at 31. Citing *Albright*, *supra*, the court again noted the United States Supreme Court has rejected the notion that substantive due process extends to preliminary hearings, and it explained that, in any event, the preliminary hearing is not a final adjudication of "life, death, liberty, and property[.]" *Id.* While the court acknowledged "significant liberty restraints may result from requiring an individual to stand trial," it highlighted that "[t]he Fourth Amendment, not due process, applies to those pretrial restraints." *Id.* at 32. The court further noted *Verbonitz* was decided prior to the amendments to Rule 542, and, thus, it observed that Justice Flaherty's concurrence "could not account for later changes to that procedure." *Id.*

6** In light of the foregoing, the court concluded appellant's due process rights were not violated. However, the court emphasized its decision was "predicated on the facts, with consideration of [a]ppellant's ability to cross-examine the primary investigator." *Id.* The court noted appellant was able to cross-examine the investigator, who witnessed A.T.'s interview, regarding the circumstances of that statement, and appellant "was free to challenge the plausibility and reliability of the hearsay when addressing the *prima facie* question." *Id.* The court stressed its decision "does not suggest that the **Commonwealth** may satisfy its burden by presenting the testimony of a mouthpiece parroting multiple levels of rank hearsay[,]" clarifying "there is no reason to think that magistrates do not already apply the similar Fourth Amendment probable cause standard used in other contexts where decisions are made on the basis of hearsay." *Id.* at 32-33, *citing* ***Commonwealth *v. Smith*, 784 A.2d 182 (Pa. Super. 2001) (probable cause determination for issuance of search warrant permits consideration of the basis of knowledge of persons supplying hearsay and various indicia of reliability and unreliability).

Judge Strassburger dissented, opining that procedural "due process requires the **Commonwealth** to produce something more than just hearsay at a preliminary hearing[.]" *Id.* at 33. (Strassburger, J., dissenting). In reaching this conclusion, Judge Strassburger first considered the liberty interests at stake and observed that, although the only restraint on liberty in the instant case was requiring appellant to stand trial, the liberty interest implicated in other similar cases may be more substantial, such as where a defendant is held without bail or cannot afford bail. Judge Strassburger contemplated the sufficiency of the procedure afforded to appellant and agreed squarely with the position advanced in Justice Flaherty's concurring opinion in *Verbonitz* that a " '*prima facie* case cannot be established at a preliminary hearing solely on the basis of hearsay testimony.' " *Id.* at 34, *quoting* *Verbonitz*, 581 A.2d at 175 (Flaherty, J., concurring). Highlighting the fact that, in the instant case, Trooper Wingard gave hearsay testimony regarding what he heard the victim tell the Child Advocacy Center interviewer, rather than testifying regarding his own interview with the victim, Judge Strassburger concluded appellant's due process rights were violated, and he cautioned that "[p]ermitting the **Commonwealth** to present testimony only from the trooper investigating this case is the beginning of a path down a slippery slope." *Id.*

II. Arguments

A. Appellant

Appellant's bedrock assertion is that the five-Justice *Verbonitz* holding — that hearsay alone is insufficient to establish a *prima facie* case at a preliminary hearing — is binding precedential authority from this Court, which the Superior Court had neither the prerogative to ignore nor the power to overrule. Appellant begins by quoting the *Verbonitz* Court's statement of the issue upon which it granted review: " 'The issue presented in this case is whether hearsay testimony presented at a preliminary hearing regarding a victim's account of an alleged criminal incident, which is the sole evidence presented by the **Commonwealth**, is sufficient

to establish a *prima facie* case.' " Appellant's Brief at 9-10, *quoting Verbonitz*, 581 A.2d at 173. Appellant advances that "[i]n the lead and concurring opinions, a majority of the Court, five (5) Justices, held that the trial court erred by permitting a *prima facie* case to be based solely on victim hearsay," and consequently, the *Verbonitz* Court ordered " 'the charges ... dismissed and the appellant ... discharged.' " *Id.* at 10, *quoting Verbonitz*, 581 A.2d at 175.

Appellant asserts the *Verbonitz* holding was not *dicta* but an " 'actual determination[ ] in respect to litigated and necessarily decided questions[.]' " *Id.*, *quoting In re L.J.*, 622 Pa. 126, 79 A.3d 1073, 1081 (2013) (additional bracketed text omitted). Appellant claims, moreover, that in cases where no majority rationale exists for a decision of this Court, the **result** of the decision is nevertheless precedential. *Id.* at 11, *citing, e.g.*, ***Commonwealth** v. Haefner*, 473 Pa. 154, 373 A.2d 1094, 1095 (1977) (where a majority of the members of this Court agree in a result, the decision is precedential). Appellant insists the "Superior Court's duty here, and in *Ricker [I]*," was simply to "follow this Court's holding in *Verbonitz*," rather than "independently analyze [the] issue[ ]" and reach an opposite result or conclusion. *Id.* at 11-12. Appellant additionally maintains the Superior Court erred here (and in *Ricker I*) to the extent it concluded only three Justices in *Verbonitz* based their result on an application of due process concerns. Appellant contends five members of the *Verbonitz* Court joined in the due process rationale, and thus "*Verbonitz* was binding on the Superior Court both as to the result and as to the rationale." *Id.* at 13.

***7** Appellant also claims the Superior Court erred in concluding the *Verbonitz* holding was expressly overruled by this Court's adoption of amended Rule 542(E). Appellant asserts the Superior Court here and in *Ricker* incorrectly determined Rule 542(E) provides that hearsay can be used to prove **all** elements of a *prima facie* case and thus, that hearsay evidence alone is sufficient to establish a *prima facie* case. Appellant argues the rule addresses when hearsay may be admissible, but by its plain terms, does not address "if and when hearsay evidence, by itself, may be sufficient to establish a *prima facie* case." *Id.* at 14-15 (emphasis omitted). Appellant acknowledges the language of the rule may be ambiguous, *see id.* at 16, *citing Ricker II*, 170 A.3d at 506 (Saylor, C.J., concurring) ("the applicable rules are not models of clarity"), but submits that "a lower court has no authority to overrule a decision of a higher court based on its interpretation of a subsequent ambiguous statement by the higher court." *Id.*, *citing Bosse v. Oklahoma*, ––– U.S. ––––, 137 S.Ct. 1, 2, 196 L.Ed.2d 1 (2016) (*per curiam*) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing validity.").

Appellant lastly maintains the Superior Court here and in *Ricker I* failed to properly consider and apply the rules of statutory construction in determining that Rule 542 permits all hearsay to be admissible and that hearsay alone is sufficient to establish a *prima facie* case.[5] Among other things, appellant argues the court in both cases erred to the extent it failed to properly interpret the phrase "[h]earsay as provided by law" in Rule 542(E) as "a limiting principle, referring to other statutes and past decisions." *Id.* at 20. According to appellant, "[c]learly, the most significant past decision is *Verbonitz* which specifically held that a *prima facie* case may not be based entirely on hearsay." *Id.*

B. Commonwealth

In response, the **Commonwealth** first asserts the Superior Court lacked jurisdiction to entertain the interlocutory appeal from the trial court's denial of a request for *habeas corpus* relief because there were no "exceptional circumstances" present. **Commonwealth**'s Brief at 1. The **Commonwealth** asserts exceptional circumstances exist, *inter alia*, " 'where an issue of great importance is involved.' " *Id.* at 2, *quoting **Commonwealth** v. Reagan*, 330 Pa.Super. 417, 479 A.2d 621, 622 (1984) (internal citation and quotation omitted). However, while acknowledging the Superior Court determined "important" constitutional questions were implicated in the appeal, the **Commonwealth** avers that "important is not enough; issues must be of great importance to warrant [interlocutory] review." *Id.* The gravamen of the **Commonwealth**'s argument is that "[a]ppellant has not lost any constitutional rights[,]" because he still has the full panoply of trial rights "ahead of him." *Id.* Thus, despite the fact this Court granted discretionary review of the discrete issue involving the precedential effect of *Verbonitz*, the **Commonwealth** asserts the instant appeal should be quashed.

[3] The **Commonwealth** next argues the Superior Court correctly treated *Verbonitz* as a non-binding plurality opinion. Quoting Justice Flaherty's concurring opinion in which he described Justice Larsen's lead opinion as a "plurality[,]" the **Commonwealth** asserts "[t]he Justices who decided the *Verbonitz* case agree that it is a plurality and no amount of legal wrangling and twisting by the [a]ppellant will

change that." *Id.* at 3, *quoting Verbonitz*, 581 A.2d at 175 (Flaherty, J., concurring). " 'Plurality opinions, by definition, establish no binding precedent for future cases.' " *Id.*, *quoting* ***Commonwealth*** *v. Brown*, 582 Pa. 461, 872 A.2d 1139, 1165 (2005) (Castille, J., concurring). The **Commonwealth** therefore concludes the Superior Court committed no error in declining to find the *Verbonitz* reasoning persuasive.

***8** Moreover, in the **Commonwealth**'s view, appellant's argument regarding the proper statutory interpretation of the phrase "hearsay as provided by law" is "illogical[;]" *i.e.*, the phrase does not mean "that hearsay can be used except for the limits placed by *Verbonitz*." *Id.* at 5. Instead, the **Commonwealth** asserts, "the plain meaning of the words is that hearsay, as defined by the Rules of Evidence, can be used to meet the *prima facie* burden ... at the preliminary hearing." *Id.* The **Commonwealth** further argues any interpretation of Rule 542(E) that incorporates the *Verbonitz* plurality rationale would directly contradict the rule's command that " 'Hearsay evidence shall be sufficient to establish any element of an offense.' " *Id.*, *quoting* Pa.R.Crim.P. 542(E). The **Commonwealth** insists, "[e]ither *Verbonitz* controls or Rule 542([E]) controls; they cannot be reconciled." *Id.*

The **Commonwealth** maintains that, in any event, "[u]sing hearsay alone to prove a *prima facie* case does not violate substantive due process." *Id.* It notes that preliminary hearings are not constitutionally mandated; however, it also recognizes that once a state decides to institute such a proceeding "then procedural due process must apply." *Id.* at 6. The **Commonwealth** insists appellant received all the process that was due — he received adequate notice, the opportunity to be heard, and the chance to defend himself before a fair and impartial tribunal. Regarding cross-examination, the **Commonwealth** notes appellant, in fact, cross-examined Trooper Wingard at some length, and notes the language of Pa.R.Crim.P. 542(C) allows only that a "defendant ... **may** cross-examine witnesses[.]" *Id.* at 8, quoting Pa.R.Crim.P. 542(C) (emphasis supplied by the **Commonwealth**). The **Commonwealth** suggests Rule 542 does not give an accused the right to cross-examine his accusers, but merely provides an accused the right to cross-examine whatever witnesses are presented at the hearing. Finally, the **Commonwealth** argues that hearsay in the preliminary hearing context is similar to that permitted in the context of seeking a search warrant, and submits the information provided by Trooper Wingard was reliable since his basis of knowledge was probed and it sufficiently supported the reliability of the hearsay evidence.

C. *Amici*

Amici Curiae, Attorney General Josh Shapiro and the Pennsylvania District Attorneys Association ("*amici*") have jointly filed a brief on behalf of the **Commonwealth**. They assert the due process clause permits a preliminary hearing judge to hold a case for court and detain a defendant pending trial on the basis of hearsay evidence alone. In support, *amici* first suggest *Verbonitz* was unmistakably a plurality decision, a point they claim Justices Larsen and Flaherty made "clear" in their separate writings acknowledging their separate rationales — the "lead opinion" was based on "the constitutional rights of confrontation and cross-examination" while the concurrence "would resolve the case on due process grounds[.]" *Amici* Brief at 5 (internal quotations and citation omitted). Nevertheless, *amici* recognize Justices Larsen and Flaherty both cited due process principles addressed in ***Commonwealth****, Unemployment Compensation Bd. of Review v. Ceja*, 493 Pa. 588, 427 A.2d 631 (1981) ("*Ceja*"). *Amici* characterize *Ceja* as an "unrelated case[,]" and assert the citations to *Ceja* in the separate *Verbonitz* expressions amounted to "general language[.]" *Amici* Brief at 5 n.1.[6] *Amici* additionally note the comment to Rule 542(E) describes *Verbonitz* as a "plurality" and suggests the "weight of authority, both federal and state, clearly supports the use of hearsay alone to find a *prima facie* case or detain a defendant." *Id.* at 7-9, *citing, inter alia, United States v. Delker*, 757 F.2d 1390 (3rd Cir. 1985) (rejecting claim hearsay may not be used at pretrial detention hearing to demonstrate defendant committed crime charged).

***9** *Amici* then pivot to this Court's authority to "create sensible rules for the use of hearsay evidence at preliminary hearings." *Id.* at 10. Acknowledging "the role of hearsay has proved to be a vexing problem in Pennsylvania jurisprudence" that "remains unresolved after decades of litigation and rulemaking[,]" and that previous approaches have "too often tried to be quantitative[,]" *amici* suggest "the question should be addressed qualitatively: what specific kinds of hearsay are reliable enough to move the case forward to trial?" *Id.* at 10-11. *Amici* then propose "three types of evidence that are easily defined and offer elements of reliability that justify their admission for preliminary hearing purposes": 1) audio/video recordings; 2) testimony by an officer who actually participated in the interview of a witness; and 3) expert reports. *Id.* at 11-14. *Amici* ask this Court to amend the rules specifically to permit hearsay evidence of this nature.

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Amicus Curiae, the Defender Association of Philadelphia ("DAP"), has filed a brief on behalf of appellant. DAP asserts that both the lead and concurring opinions in *Verbonitz* opined that hearsay does not constitute legally competent evidence and thus, five Justices agreed hearsay alone, as a matter of due process, cannot be sufficient to make out a *prima facie* case at a preliminary hearing. DAP argues *Verbonitz* is precedential under each of three separate doctrines: 1) "result" *stare decisis*; 2) "narrowest ground of agreement" *stare decisis*; and 3) "false plurality" analysis. DAP's Brief at 6.

DAP explains "result" *stare decisis* requires any "result espoused by a majority of this Court (no matter how many separate opinions are issued to establish this) should be controlling in substantially identical cases." *Id. at* 8 (emphasis deleted), *citing* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 779 (1980); *Rappa v. New Castle County*, 18 F.3d 1043, 1061 n.26 (3rd Cir. 1994), ("[I]t seems clear that lower courts must adhere at the minimum to the principle of 'result' stare decisis, which mandates that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases. The absence of a clear majority rationale supporting the result may give a lower court some flexibility to formulate a justifying rule[;] it does not, however, justify a court in embracing a line of reasoning that will lead to a contrary result. ... Adherence to 'result' stare decisis is essential if principles of certainty and uniformity are to have any meaning at all ...."), *quoting* Novak, *supra*.

[4] DAP further claims "*Verbonitz* is actually a case in which, as a result of Justice Larsen's Opinion and Justice Flaherty's Opinion, a majority of the Court **did** agree both on the result (*i.e.* the Commonwealth cannot establish a *prima facie* case based solely on hearsay evidence) **and** one common rationale supporting the result (*i.e.* due process protections)." *Id*. at 9 (emphasis supplied by DAP). DAP argues "[this] circumstance triggers the more commonly invoked *stare decisis* 'narrowest grounds of agreement' doctrine, which treats a case as binding authority on the narrowest of grounds upon which a majority of the Court agree on both a result and its supporting rationale." *Id.*, *citing* *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]") (additional citations and quotation marks omitted). [7]

***10** DAP also advances the argument that *Verbonitz* can be seen as "what some legal commentators refer to as a 'false plurality'." *Id.* at 11, *citing* *Plurality Decisions and Judicial Decision Making*, 94 HARV. L. REV. 1127 (1981).

> The key characteristic that makes plurality decisions troublesome is the presence of at least two distinct rationales that will justify the result reached in a case, neither of which commands a majority. In some cases that are nominally plurality decisions, however, a majority of the Court does support a rationale sufficient to justify the holding. Such cases take the form of plurality decisions only because some justices go on to state additional ideas. Thus, when proposition *A* is sufficient to justify the holding, and either the plurality opinion supports *A* while the minority opinion supports both *A* and *B*, or the plurality opinion supports *A* and *B* while the minority opinion supports *A*, a 'false plurality' decision results.

Id., *quoting* *Plurality Decisions and Judicial Decision Making*, 94 HARV. L. REV. at 1130.

DAP argues a "false plurality" decision is more akin to a majority decision than a plurality decision, but due to the structure of the opinion, the majority agreement is somewhat hidden. According to DAP, "[f]or *stare decisis* purposes, the structure of a 'false plurality' should be pierced," and its points of agreement should be seen as a majority decision of the Court. *Id.* at 12. DAP contends *Verbonitz* is just such a decision because "five Justices agreed (although spread across two Opinions) that a preliminary hearing *prima facie* case based solely on hearsay evidence violates due process." *Id.*

Moreover, DAP disagrees with the Superior Court's suggestion that the continuing validity of *Verbonitz* has been undercut by the current version of Rule 542(E) and

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the Comment thereto. First, DAP notes the conclusions of Justices Larsen and Flaherty in *Verbonitz* are constitutionally-based, not rule-based. In any event, DAP observes the Comment includes specific reference to *Verbonitz* as "disapproving" of "reliance on hearsay testimony as the sole basis for establishing a *prima facie* case." *Id.* at 14, *citing* Pa.R.Crim.P. 542(E), cmt. Thus, DAP concludes, "[r]ather than being undercut by Rule [542(E)]," *Verbonitz* has been "included in" and "fortified by" the rule. *Id.*

III. Analysis

[5] **[6]** **[7]** Our Court has articulated the following standard and scope of review: "Ordinarily, an appellate court will review a grant or denial of a petition for writ of *habeas corpus* for abuse of discretion, but for questions of law, our standard of review is *de novo*, and our scope of review is plenary." ***Commonwealth*** *v. Judge*, 591 Pa. 126, 916 A.2d 511, 521 n.13 (2007) (citations omitted).[8] As stated, the precise question presented in this appeal is one of law, *i.e.*, whether the panel below failed to properly apply and follow *Verbonitz*.

A. Precedential Value of *Verbonitz*

***11** **[8]** In *Verbonitz*, the Court determined the **Commonwealth** failed to establish a *prima facie* case at a preliminary hearing. We have little difficulty in stating with certainty that five Justices in *Verbonitz* agreed a *prima facie* case cannot be established by hearsay evidence alone, and the common rationale among those Justices involved due process considerations. In the lead opinion, styled as the "Opinion of the Court," Justice Larsen wrote: "In this case it is clear that the **Commonwealth** did not meet its burden. As Justice Flaherty stated in his concurring opinion in [*Ceja*,] 'fundamental **due process** requires that no adjudication be based solely on hearsay evidence.' " *See* *Verbonitz*, 581 A.2d at 174, *quoting* *Ceja*, 427 A.2d at 647 (Flaherty, J., concurring) (emphasis added). Because hearsay "does not constitute legally competent evidence[,]" Justice Larsen explained, "the **Commonwealth** has failed to establish *prima facie* that a crime has been committed and that Buchanan committed that crime." *Id.* Justice Larsen immediately continued, "**Additionally**, a criminal defendant has a right to confront and cross-examine the witnesses against him: this right being secured by the United States Constitution; the Pennsylvania Constitution; and the Pennsylvania Rules of Criminal Procedure." *Id.* (emphasis supplied, footnotes omitted). Justice Larsen stated, "[a] preliminary hearing is an adversarial proceeding which is a critical stage in a criminal prosecution[,]" and concluded Buchanan was denied his constitutional rights to confrontation and cross-examination. *Id.* at 175. Justice Larsen's opinion was joined by Justice Zappala and Justice Papadakos.

In his concurring opinion, Justice Flaherty opined he "reach[ed] the same conclusion through an analysis somewhat different from that employed by the plurality." *Id.* at 175 (Flaherty, J. concurring). Justice Flaherty observed that to "establish a *prima facie* case, the **Commonwealth** must produce evidence which presents sufficient probable cause to believe that the person charged has committed the offense stated." *Id.* (internal quotation marks and citation omitted). Noting the United States Supreme Court has "implied in dictum, but has not held, that other rights, such as the right to confrontation and the right to cross-examination, are constitutionally protected at the preliminary hearing[,]" Justice Flaherty opined those considerations "do not answer the question presented to us: whether hearsay testimony, **standing alone**, may constitute sufficient evidence to establish a *prima facie* case at a preliminary hearing." *Id.* (emphasis in original). Justice Flaherty "conclude[d] that it cannot[,]" and "deem[ed] this to be a requirement of due process." *Id.* Justice Flaherty then cited his *Ceja* concurrence for the proposition that "fundamental **due process** requires that no adjudication be based solely on hearsay." *Id.* at 176 (emphasis added). Accordingly, we conclude that although *Verbonitz* is nominally a plurality decision, it is clear that a five-member majority of the Court held hearsay alone is insufficient to establish a *prima facie* case at a preliminary hearing because to do so violates principles of fundamental due process.

B. The Validity of *Verbonitz* Following Adoption of Rule 542(E)

[9] While the subsequent promulgation of Rule 542(E) in 2011 permitted the use of hearsay in preliminary hearings, appellant challenges the instant panel's interpretation of the rule as permitting unlimited use of hearsay, as announced in *Ricker I*, as long as such use is not in the nature of layers of rank hearsay. We begin by observing that we apply the Statutory Construction Act, 1 Pa.C.S. §§ 1501-1991, when interpreting the Rules of Criminal Procedure. *See* Pa.R.Crim.P. 101(C) ("To the extent practicable, these rules

shall be construed in consonance with the rules of statutory construction.").

Turning to the interpretation of Rule 542(E) as set forth in *Ricker I*, we first note the rule, as originally set forth in 2011, expressly stated hearsay as provided by law "shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property." *See* Pa.R.Crim.P 542(E) (2011 version). The rule, by its plain language, was of limited scope. It permitted "[h]earsay as provided by law" to be "considered" and offered primarily to establish elements of property offenses. The rule, in part, relieved victims of property offenses from attending an accused's preliminary hearing simply to establish facts about the ownership of, nonpermissive use of, damage to, or value of stolen property. Notably, at that time, the rule was in essential harmony with the *Verbonitz* lead and concurring opinions, which concluded legally competent evidence, and not hearsay alone, was required to establish the elements which must be proven at a preliminary hearing. Thus, initial promulgation of subsection (E), to an extent, formalized a procedure many preliminary hearing courts were already following — allowing some hearsay to prove some elements when other legally competent, non-hearsay evidence was also presented, in accordance with the conclusion of the five *Verbonitz* justices who opined hearsay evidence alone is not sufficient to establish a *prima facie* case. *See, e.g.* ***Commonwealth** v. O'Shea-Woomer*, 8 Pa.D.&C.5th 178, 184 (Lanc. Co. 2009) (admitting hearsay medical report at preliminary hearing where other non-hearsay evidence was presented to establish *prima facie* case, and noting "hearsay evidence **alone** may not be the basis for establishing a prima facie case in a preliminary hearing") (emphasis in original). *See also* ***Commonwealth** v. Camacho*, 2007 Pa.Dist.&Cnty. (Ches. Co.) (granting pre-trial writ of *habeas corpus* on basis **Commonwealth** presented hearsay evidence alone, concluding "the **Commonwealth** has failed to present a *prima facie* case by competent evidence").

***12** Rule 542(E), however, was expanded in 2013. Implicit in our consideration of the Superior Court's decision below is the scope of the expanded rule, and in particular, whether, as the Superior Court held in *Ricker I* and suggested here, the rule supplants *Verbonitz*, and permits **all** elements of **all** offenses to be established at a preliminary hearing solely on the basis of hearsay evidence. We determine Rule 542(E), though not the model of clarity, does not permit hearsay evidence alone to establish all elements of all crimes for purposes of establishing a *prima facie* case at a defendant's preliminary hearing.

[10] [11] [12] Initially, although the word "any" is an adjective which can mean "one, some, every, or all," THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993), the precise meaning of its usage depends largely on the context in which it is employed. *See Snyder Bros. v. Pa. PUC*, — Pa. ——, 198 A.3d 1056, 1073 (2018) ("we consider the meaning of the term 'any' to be wholly dependent on the context in which it is used in the particular statute under review"); *see also JP Morgan v.Taggart*, —— Pa. ——, 203 A.3d 187, 193-94 (2019) (same). " 'A statute is ambiguous when there are at least two reasonable interpretations of the text.' " *Id.* at 194, *quoting A.S. v. Pa. State Police*, 636 Pa. 403, 143 A.3d 896, 905-06 (2016). Because the alternative interpretations of "any" offered by the parties are reasonable, rendering its meaning ambiguous, we resort to the canons of statutory construction. Those canons require us to consider matters beyond the statutory language, including the occasion and necessity of the statute or rule, the mischief to be remedied, and the object to be attained. *See* 1 Pa.C.S. § 1921(c). In addition, we read the sections of Rule 542 together, and we construe them to give effect to all of the rule's provisions. *Id.* at § 1921(a).

[13] [14] Under Rule 542(E), hearsay shall be sufficient to prove any element. The word "any" is used to describe an element (or elements) of an offense, including, but not limited to, those for which proof of ownership of, non-permitted use of, damage to, or value of property is required. Thus, contextually under the rule, the understanding of "any" is intended to mean an indefinite or unknown quantity. Nevertheless, although the rule suggests the quantity of "any" may be indefinite, that quantity is delimited by the phrase "[h]earsay **as provided by law** shall be considered" contained in the first sentence of subsection (E). *See* Rule 542 (E) ("Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established.") (emphasis added). Some meaning must be ascribed to every word in a statute (or rule, in the present case), and there is a presumption that disfavors interpreting language as mere surplusage. 1 Pa.C.S. § 1922(2) ("[i]n ascertaining the intention of the General Assembly in the enactment of a statute," a court may presume "the General Assembly intends the entire statute to be effective and certain"); *S & H Transp., Inc. v. City of York*, 636 Pa. 1, 140 A.3d 1, 7 (2016) (in construing language of statute,

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court must give effect to every word, and may not assume any words were intended as mere surplusage).

[15] Hearsay is generally inadmissible in legal proceedings unless it falls under a recognized exception. ***Commonwealth** v. Ali*, 608 Pa. 71, 10 A.3d 282, 315 (2010). The critical term in the phrase "hearsay as provided by law" is the word "provided," which is a conjunction meaning "on the condition [of]." THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993). Thus, the phrase "hearsay as provided by law" could reasonably mean hearsay as defined by law, *i.e.* an out-of-court statement presented as evidence of the truth of the matter asserted. *See, e.g., Castellani v. Scranton Times, L.P.*, 633 Pa. 230, 124 A.3d 1229, 1239 (2015), *quoting* Pa.R.E. 801(c) (defining hearsay as out-of-court statement made by declarant that party "offers in evidence to prove the truth of the matter asserted in the statement").

***13** Nevertheless, appellant's argument that the phrase "as provided by law" is a limiting principle is also reasonable. Because "as provided by law" could alternatively mean "contingent on" or "subject to" law, the phrase can be a bulwark against reading the rule as a sweeping pronouncement permitting hearsay alone to prove all elements of all offenses at a preliminary hearing. Indeed, although the 2013 amendment expanded the potential offenses for which hearsay shall be permitted, the amended comment specifically added a comparison citation to *Verbonitz,* which parenthetically highlighted the contrasting conclusion disapproving the use of hearsay alone to establish a *prima facie* case at a preliminary hearing. *See Rossi v. **Commonwealth**, Bureau of Driver Licensing*, 580 Pa. 238, 860 A.2d 64, 66 (2004) ("individual statutory provisions must be construed with reference to the entire statute of which they are a part"), *citing* 1 Pa.C.S. § 1922(2); *see also **Commonwealth** v. Lurie*, 524 Pa. 56, 569 A.2d 329, 331 (1990) ("[S]ections of statutes are not to be isolated from the context in which they arise such that an individual interpretation is accorded one section which does not take into account the related sections of the same statute."), *quoting **Commonwealth** v. Revtai*, 516 Pa. 53, 532 A.2d 1, 5 (1987).

[16] **[17]** As the foregoing analysis reveals, the amended rule does not evince an articulated intent to overrule *Verbonitz* or re-affirm it; instead, subsection (E) is intended to allow some use of hearsay. The plain language of the rule does not state a *prima facie* case may be established solely on the basis of hearsay, despite the Superior Court's contrary interpretation. Significantly, the rule as written is open to reasonable yet opposing interpretations. Indeed, given that the word "any" and the phrase "as provided by law" are ambiguous, particularly in light of the comment citing *Verbonitz*, we now prudentially apply the "canon of constitutional avoidance," which instructs "we are bound to interpret a statute, where possible, in a way that comports with the constitution's terms." ***Commonwealth** v. Veon*, 637 Pa. 442, 150 A.3d 435, 443 (2016). In other words, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.*, *quoting Harris v. United States*, 536 U.S. 545, 555, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). [9]

[18] **[19]** **[20]** **[21]** **[22]** "The primary reason for the preliminary hearing is to protect an individual's right against unlawful arrest and detention." ***Commonwealth** ex rel. Maisenhelder v. Rundle*, 414 Pa. 11, 198 A.2d 565, 567 (1964). The preliminary hearing "seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection." *Id.* Our precedents make clear the full panoply of trial rights do not apply at a preliminary hearing, but the hearing is nevertheless a critical stage of the proceedings, and is intended under Rule 542 to be more than a mere formality. Due process clearly attaches, but due process is a flexible concept, incapable of precise definition. *See Turner*, 80 A.3d at 764 (although its basic elements are known, procedural due process "not capable of an exact definition"). Here, at the hearing afforded appellant, the **Commonwealth** relied exclusively and only on evidence that could not be presented at a trial. This is precisely the circumstance and rationale upon which five Justices in *Verbonitz* determined Buchanan's right to due process was violated. [10]

IV. Conclusion

***14** **[23]** We reaffirm the validity of *Verbonitz*. We therefore reverse the Superior Court's decision below and expressly disapprove *Ricker I*. The appellant is discharged without prejudice. [11]

Justices Todd, Donohue and Wecht join the opinion.

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Justice Wecht files a concurring opinion.

Chief Justice Saylor files a concurring and dissenting opinion.

Justice Baer files a dissenting opinion in which Justice Mundy joins.

JUSTICE WECHT, concurring

For all of the reasons provided in my dissenting statement in *Commonwealth v. Ricker*, 642 Pa. 367, 170 A.3d 494 (2017) (*per curiam*) (Wecht, J., dissenting), I join the Majority Opinion.

The Court is called upon to decide whether procedural due process protections preclude prosecutors from establishing a *prima facie* case at a preliminary hearing utilizing only hearsay testimony—evidence that would not be admissible at trial, and therefore is categorically incapable of demonstrating that the prosecution later will be able to prove the defendant's guilt beyond a reasonable doubt. As it turns out, this is an elusive question. In 1990, five members of this Court presumably thought the matter settled. *See Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990). But as time marched on, the five votes cast in favor of prohibiting this tactic were miscalculated and misconstrued, ostensibly relegating the case to non-binding status. *See Commonwealth v. McClelland*, 165 A.3d 19, 24 n.4, 31 (Pa. Super. 2017); *Commonwealth v. Ricker*, 120 A.3d 349, 361 (Pa. Super. 2015), *appeal dismissed as improvidently granted*, 642 Pa. 367, 170 A.3d 494 (2017). In my dissenting statement in *Ricker*, I objected to the Superior Court's "parched interpretation" of *Verbonitz*, and opposed that court's attempts to bury the precedent as a "valueless plurality." *Ricker*, 170 A.3d at 517 (Wecht, J., dissenting). Over my objection, this Court dismissed *Ricker* as improvidently granted, and resolution of this important question again escaped final review.

Today, the Court finally settles the matter. By restoring *Verbonitz* to precedential status, and by holding that a *prima facie* case premised exclusively upon hearsay offends our deeply rooted understanding of due process, we correct the wayward path that the law governing preliminary hearings has taken in recent years. I write separately to elaborate upon the role that the preliminary hearing plays in Pennsylvania's criminal justice system, and upon how today's decision should be implemented going forward.

A criminal case in Pennsylvania ordinarily commences when a police officer arrests a suspect and files a criminal complaint (and an accompanying affidavit of probable cause) with a magisterial district judge. See Pa.R.Crim.P. 503, 504. Typically, the prosecutor does not participate in either the investigation or the arrest of the suspect, and does not appear at the preliminary arraignment. That all changes at the preliminary hearing. *See id.* at 542(A)(1) ("The attorney for the Commonwealth may appear at a preliminary hearing and ... assume charge of the prosecution."). At that hearing, "the Commonwealth bears the burden of establishing at least a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it." *Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589, 591 (1991) (citing *Commonwealth v. Prado*, 481 Pa. 485, 393 A.2d 8 (1978)). To satisfy its burden—and to convince the magisterial district judge to bind the defendant over for trial —the Commonwealth must "present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense." *Id.* (citing *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991 (1983)).

The hearing itself is not a mere formality, nor is it a part of the process to be viewed as unimportant because the Commonwealth's evidentiary burden is a relatively light one. To the contrary, the preliminary hearing, although not constitutionally mandated, is a "critical stage" in the criminal justice process, *see* Maj. Op. at ——; *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (plurality), and plays a crucial part in maintaining the constitutional boundary between the government and the individual. "The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention." *McBride*, 595 A.2d at 591. "For all parties involved, it serves a core function, and it protects against unwarranted governmental intrusions upon a citizen's liberty." *Ricker*, 170 A.3d at 517 (Wecht, J., dissenting). The preliminary hearing is not a trial and does not require proof beyond a reasonable doubt, *McBride*, 595 A.2d at 591 (citing *Commonwealth v. Rick*, 244 Pa.Super. 33, 366 A.2d 302 (1976) (en banc)), but it nonetheless serves a "vital role in our criminal justice system." *Ricker*, 170 A.3d at 517 (Wecht, J., dissenting). At the hearing, the "**Commonwealth** must appear before a neutral and detached magistrate and justify restraints of a person's liberty—restraints imposed by pretrial incarceration, by requiring a person to defend against criminal charges, or both." *Id.* at 509.

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With such weighty interests at stake, it should go without saying that the result of a hearing so intertwined with one's liberty interests cannot rest exclusively upon evidence that is unreliable, inadmissible, and provides no assurances as to the future viability of a particular prosecution. The quality and reliability of hearsay evidence does not improve merely by introducing more hearsay statements, or by stacking them on top of each other. It seems obvious then that it is insufficient to use nothing but hearsay as a mechanism to establish the factual predicates for a defendant's continued detention.

To hold otherwise would render this "critical stage" of the criminal process "illusory." *Ricker*, 170 A.3d at 517 (Wecht, J., dissenting). At such "an illusory proceeding, the interests, purposes, rights, and benefits of a preliminary hearing are denuded of substance or meaning." *Id.* As I explained previously:

> As a flexible concept, due process is necessarily incapable of precise definition. However, by any definition, principles of fundamental fairness and ordered liberty demand minimally that, when the law affords an individual a hearing, particularly one where restraint of a person's liberty interest is at issue, that hearing cannot be a functionless formality, nor entirely one-sided. Our Constitutions and our laws identify rights and interests that play an important role in the preliminary hearing. When the **Commonwealth** is permitted to circumvent each of those rights and interests by introducing only evidence that cannot be introduced at trial, and nothing more, that hearing falls well below the line that due process draws. Nothing about such a hearing satisfies "the community's sense of fair play and decency." [*United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)].
>
> When the law affords a hearing to a person involved in our judicial system, particularly a hearing in which that person's liberty is at stake, the hearing must be more than a mere formality. In the words of Justice Benjamin Cardozo, "[t]he hearing, moreover, must be a reasonable one, not a sham or a pretense." *Palko v. State of Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (citations omitted) (*overruled by Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (holding that the Due Process Clause required incorporation of the Fifth Amendment's Double Jeopardy Clause to the states)).

Id. at 519-520 (parallel citations omitted).

Thus, it is readily apparent that no reasonable understanding of the preliminary hearing and of basic concepts of due process countenance an evidentiary demonstration premised on nothing but inadmissible hearsay. A more difficult question to answer is, if the *prima facie* case cannot be made by hearsay only, how much hearsay can be used? The answer to the question becomes clear after contemplation of the interests served by the preliminary hearing for each of the three principal players: (1) the magisterial district judge; (2) the prosecutor; and (3) the charged defendant.

The magisterial district judge presides over the preliminary hearing and is responsible for a number of decisions critical to the progression of the criminal justice process in each individual case. The judge must listen to the evidence and decide whether the defendant should "be discharged," Pa.R.Crim.P. 542(A)(2), or whether the **Commonwealth** has established a *prima facie* case such that the defendant should be "bound over to court according to law," *id.* The magisterial district judge's decision to bind a case for trial is an authorization to the **Commonwealth** to continue to detain the defendant—either physically in jail or by compelling the defendant to appear for hearings and to stand for trial. The jurist presides over the hearing in order to "prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection." ***Commonwealth*** *ex rel. Maisenhelder v. Rundle*, 414 Pa. 11, 198 A.2d 565, 567 (1964).

The evidentiary presentation, and the decision flowing from it, is a preview of what would be presented at an actual trial and is meant to convince the magisterial district judge that there is at least some evidence for all elements of the charged offenses, and that the charges and detention accordingly are warranted. The actual presentation informs the magisterial district judge's decision as to whether to hold all of the charges for trial, dismiss all of the charges, or dismiss some and hold others. The **Commonwealth**'s evidence illuminates for the magisterial district judge the nature and severity of the crimes charged, the facts and circumstances underlying the arrest and the charges, and the role that the defendant played in the crimes. This body of information is material not just to the *prima facie* determination, but it also provides a foundation to modify, reduce, or increase the defendant's bail.

The use of inadmissible hearsay undermines each of these decisions. The more hearsay is relied upon at a preliminary hearing, the less "confidence can be ascribed to that decision.

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In principle, the justification for the Commonwealth's charges would be no different than if the prosecutor had looked up to the judicial officer and said 'trust me, we can prove this case later.' " Ricker, 170 A.3d at 519 (Wecht, J., dissenting). This is true when the Commonwealth relies upon any amount of hearsay to establish the material aspects of its *prima facie* case.

Evidence that the law deems unreliable *per se* naturally engenders unreliable results. Not only is the *prima facie* determination questionable when based upon hearsay; so, too, would be any collateral decisions that are made based upon such information, decisions such as bail modifications or issuances of "no contact" or "stay away" orders. Simply put, reliance upon hearsay undermines each and every aspect of the magisterial district judge's role at this "critical stage."

For the Commonwealth, the preliminary hearing often is the prosecutor's entry point into the process, and provides the prosecutor with the first substantive view of the evidence that police uncovered before charging the defendant. The hearing affords the Commonwealth an opportunity to speak to its witnesses for the first time before a neutral fact-finder, to present live testimony to enable evaluation of the strengths and weaknesses of the case, to add or withdraw charges as necessary, and to set the case on course for a trial on charges that are warranted by the facts. The Commonwealth can make its own initial credibility assessments, direct additional investigation or scientific testing of evidence, and contemplate future plea offers, all based upon the preview of the case that a reliable preliminary hearing provides.

Having such a solid understanding of the strengths and weaknesses of a case promotes efficiency in the process by prompting the Commonwealth to utilize its resources to prosecute only the charges that are reasonably capable of being proven at trial. Knowing from the outset that a case would be difficult or impossible to prove, or that a case does not warrant the severity of the charges being pursued by the police initially, the prosecution may tailor the allocation of its resources prudently, perhaps by seeking to reach a plea agreement with the defendant, which, in turn, provides the corollary benefit (among others) of minimizing the amount of exposure the victim of crime has to the court system.

The Commonwealth can achieve none of this if the case relies upon the weak and unreliable foundation that hearsay lays. Hearsay can taint not only the initial perception of the strength of a case, but reliance upon the same might influence future prosecutorial decisions and arguments, heightening the possibility that a defendant could remain incarcerated longer than is necessary or justified, or that a victim will be forced to testify in cases that should have settled with plea bargains.

It nether diminishes nor harms any legitimate prosecutorial purpose to require the Commonwealth to meet its evidentiary burden with actual, admissible evidence. There is a valid concern that requiring live testimony to establish material elements of a *prima facie* case would increase victims' exposure to the criminal justice process. I do not discount this argument, nor do I in any way downplay the trauma that crime and the obligations attendant to a prosecution of that crime have on victims. But the Commonwealth's role is more than just advocating for one victim, or even for victims generally. The Commonwealth's greater obligation is to represent the people as a whole, and to stand for the interests of the state in prosecuting crimes. A prosecutor's job is "not merely to convict." ***Commonwealth*** *v. Clancy*, 648 Pa. 179, 192 A.3d 44, 52 (2018) (quoting ***Commonwealth*** *v. Starks*, 479 Pa. 51, 387 A.2d 829, 831 (1978)). The prosecutor is an "officer of the court," an "administrator of justice," and an "advocate." *Id.* In wearing each of these three hats, the prosecutor's devotion is to the law, and the prosecutor simultaneously must "enforce the interests of the public" and "respect the rights of the defendant." *Id.*

At all times, "[t]he prosecutor must ensure that 'the defendant is accorded procedural justice and that [adjudications are] decided upon the basis of sufficient evidence.' " *Id.* at 52-53 (citing Pa.R.P.C. 3.8 cmt. 1; and MODEL RULES OF PROF'L CONDUCT 3.8 cmt. 1 (AM. BAR ASS'N 2015)) (brackets omitted). Adjudications predicated upon inadmissible evidence satisfy neither of these prosecutorial responsibilities. It does not matter that the evidentiary threshold is low, or that the preliminary hearing is not intended to be a full criminal trial. It is a proceeding that affects the substantive rights of an accused and implicates significant societal interests, and, once afforded as a matter of law, it cannot be cast aside as a mere formality. Hearsay is not sufficient evidence. Hearings based upon insufficient evidence fail to afford procedural justice. Prosecutors are duty-bound to satisfy lofty responsibilities. Allowing those ministers of justice to circumvent burdens using inadmissible evidence serves none of those responsibilities.

For the defendant, the preliminary hearing is a crucial proceeding. As I explained in *Ricker*:

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> The preliminary hearing was not created for the purpose of serving as a trial preparation tool for the defense. This does not mean that no benefits necessarily and naturally accrue to the defendant in conducting the hearing according to its true purpose and within the confines of our Constitutions. A true preliminary hearing involves introduction by the Commonwealth of the minimum competent evidence to establish a prima facie case. In doing so, the Commonwealth opens its case to preliminary inspection and subjects its witnesses to basic cross-examination. Each is necessary to convince the presiding judicial officer that the Commonwealth's restraint upon the accused's liberty is warranted.... [T]his allows the accused and his counsel to probe the testimony, to make arguments against the charges or in favor of bail, and to preserve favorable testimony. It also serves as a limited discovery tool, which can inform decisions on whether to challenge the seizure of the accused or the acquisition of evidence in a suppression motion, and on what defense to pursue, if any. Moreover, the ability to participate fully in a preliminary hearing can aid in focusing subsequent expenditures of limited investigative resources, something that is particularly beneficial to chronically (and unlawfully) underfunded public defender's offices. *See Kuren v. Luzerne Cty.*, 637 Pa. 33, 146 A.3d 715, 717 (2016).

Ricker, 170 A.3d at 518 (some citations omitted).

Reliance upon hearsay to establish any of the material elements of a preliminary hearing would render "the right to counsel and the rule-based right to cross-examine witnesses ... nothing more than hollow formalities, promises broken." *Id.* at 519.

> There would be no ability to test the Commonwealth's prima facie case, no witnesses to cross-examine, no testimony to preserve. Counsel would not be able to identify weaknesses in the Commonwealth's case or to identify possible defenses, as counsel would have no reason to be confident that the [hearsay] accurately or fully reflect[s] what the witness would say on the witness stand at trial. The right to counsel, and [the] concomitant rule-based right to cross-examine witnesses, would shrink to a right merely to have a warm body stand next to the accused, incapable of serving any real function on the accused's behalf.
>
> Additionally, the accused would be deprived of the other benefits that flow from participating in a preliminary hearing, such as obtaining a fair idea of the case against him or her and being able to allocate resources accordingly. At the same time, the Commonwealth would benefit from shielding its case and its witnesses from testing and examination, and would be permitted to proceed on little more than its assurance that it will produce competent evidence at some later date.

Id.

The introduction of some hearsay at a preliminary hearing is necessary, and traditionally has been permitted. Hence, I do not quibble with the introduction of hearsay to establish the value of real or personal property for grading purposes, to present scientific, technical, or forensic information, or to introduce laboratory reports. Otherwise, going forward, either in practice or mandated by our rules of procedure, hearsay should be eliminated from preliminary hearings as a substitute for eyewitness testimony, police testimony, or other testimony bearing upon the establishment of the material elements of a *prima facie* case. Viewed as a sliding scale, the more hearsay that is allowed at preliminary hearings, the more the purposes and interests of the hearing are disserved. Consequently, subject to very limited exceptions, I discern no persuasive, let alone compelling, justification to allow the preliminary hearing to devolve into an unreliable formality.

CHIEF JUSTICE SAYLOR, concurring and dissenting

I join the majority's analysis to the extent it reflects that a majority of Justices in *Buchanan v. Verbonitz*, 525 Pa. 413,

581 A.2d 172 (1990) (plurality), held that hearsay alone is insufficient to sustain the **Commonwealth**'s burden of establishing a prima facie case at a preliminary hearing. *Accord* ***Commonwealth*** *v. Ricker*, 642 Pa. 367, 375 & n.5, 170 A.3d 494, 499 & n.5 (2017) (Saylor, C.J., concurring). I also agree that a majority of Justices advanced a due process rationale in *Verbontiz*. *See* Majority Opinion, at ——. [1]

As Justice Baer highlights, however, the *Verbonitz* due process rationale is severely lacking. See Dissenting Opinion, at —— – ——, —— – ——. In this regard, both the lead opinion and the concurrence rested the entire analysis upon an inapt analogy between final administrative adjudications of rights or interests and preliminary hearings in criminal cases, at which no such final adjudication occurs. See id. For this reason, I find that *Verbonitz* is so insufficiently reasoned that it fails to qualify for precedential treatment. *See generally Mayhugh v. Coon*, 460 Pa. 128, 135, 331 A.2d 452, 456 (1975) (discussing *stare decisis* and the applicable exceptions).

I do not believe, however, that this case presents a suitable vehicle to proceed further to address the due process issue, decoupled from *Verbonitz*'s faulty rationale. Of course, I certainly understand the dissent's approach of proceeding to do so, particularly in light of the substantial public importance and the difficulty the Court has had with identifying a suitable case. But I note that there is no advocacy on this subject from the criminal-defense side, given that Appellant has assiduously staked his position to *Verbonitz*. Accordingly, and since I differ with Appellant's contention that *Verbonitz* should control, I would simply affirm the order of the Superior Court.

Finally, the majority asserts, "that grave and doubtful constitutional concerns are evident is beyond peradventure." Majority Opinion, at —— n.9. It is significant, however, to me at least, that such concerns proceed largely from the Court's decision to impose a burden on the **Commonwealth** beyond what is required by the federal and state constitutions, *i.e.*, the burden to establish a *prima facie* case as opposed to probable cause. *See generally Ricker*, 642 Pa. at 380-86, 170 A.3d at 502-06 (Saylor, C.J., concurring) (discussing the uncertainties and difficulties flowing from the maintenance of this ostensibly higher, extra-constitutional standard).

I believe this Court should carefully consider whether this extra-constitutional measure of protection remains feasible in the modern era, particularly in light of the increased phenomenon of witness intimidation. As summarized in a United States Department of Justice publication:

> Citizens who witness or are victimized by crime are sometimes reluctant to report incidents to police or to assist in the prosecution of offenders. Such reluctance may be in response to a perceived or actual threat of retaliation by the offender or his or her associates, or may be the result of more generalized community norms that discourage residents from cooperating with police and prosecutors. In some communities, close ties between witnesses, offenders, and their families and friends may also deter witnesses from cooperating; these relationships can provide a vitally important context for understanding witness intimidation. Particularly in violent and gang-related crime, the same individual may, at different times, be a victim, a witness, and an offender. Historically, witness intimidation is most closely associated with organized crime and domestic violence, but has recently thwarted efforts to investigate and prosecute drug, gang, violent, and other types of crime.

See generally KELLY DEDEL, U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING STRATEGIES, PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES, WITNESS INTIMIDATION 2 (2006). Although empirical research may remain sparse, "small-scale studies and surveys of police and prosecutors suggest that witness intimidation is pervasive and increasing." *Id.* at 5.

In my view, the salutary effect of providing criminal defendants with an extraconstitutional layer of protection at preliminary hearings via the maintenance of the prima facie standard must be weighed against the burden imposed on the **Commonwealth** to repeatedly produce victims and other lay witnesses during multiple phases of a criminal prosecution. In this balance, I find that serious consideration should be

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given to recalibrating preliminary hearings according to the constitutionally-prescribed requirement for the government to establish probable cause and leaving the conferral of any additional rights to the political branch, which is better situated to make broad-scale assessments of social policy.[2]

JUSTICE BAER, dissenting

I respectfully dissent from the Majority's holding that this Court's decision in ***Commonwealth*** *ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990), constitutes binding precedent for the proposition that the **Commonwealth** cannot establish a *prima facie* case at a preliminary hearing based exclusively on hearsay evidence. Indeed, for thirty years, courts in this **Commonwealth**, including this Court, have consistently viewed *Verbonitz* as a plurality decision. The lack of a majority expression is unmistakable as the author of the concurring opinion in *Verbonitz* did not join the lead opinion, expressly concurred only in the result based upon a distinct legal theory, and explicitly referred to the lead opinion as a "plurality." Id., 581 A.2d at 175. It is well-settled in this **Commonwealth** that a plurality opinion is not binding precedent. ***Commonwealth*** *v. A.R.*, 622 Pa. 356, 80 A.3d 1180, 1183 (2013). Thus, I cannot join the Court's pronouncement, decades after *Verbonitz* was decided, that the opinion is now suddenly imbued with authoritative value.

I agree, however, that the question of whether the **Commonwealth** can rely solely on hearsay evidence at the preliminary hearing is not answered by this Court's promulgation and subsequent amendment to Pa.R.Crim.P. 542(E), as the text of the rule does not address the exclusive use of hearsay at preliminary hearings.[1] Viewing the issue as an open one, I would proceed to examine the legal inquiry anew. Because there is indisputably no constitutional right to a preliminary hearing and because Appellant was afforded all the process to which he was due at that proceeding, I agree with the Superior Court that Appellant's due process rights were not violated by the **Commonwealth**'s exclusive reliance on hearsay evidence to demonstrate a *prima facie* case that a crime had been committed and that Appellant was probably the person who committed that crime.

Further, although not constitutionally required, just as this Court has established a rule-based right to a preliminary hearing, it may, and in my view should, create reasonable parameters for the admission of only those types of hearsay evidence that are the most reliable, such as, for example, audio and video recordings of the victim's statements. The crafting of these parameters, however, is outside the scope of this appeal and is better left for the Criminal Procedural Rules Committee's evaluation upon consideration of our decision herein.

Accordingly, I would affirm the Superior Court's judgment, which affirmed the trial court's order denying Appellant's pretrial motion for *habeas corpus* relief. Additionally, I would refer this matter to the Criminal Procedural Rules Committee for further consideration.

I. The Verbonitz Decision

The crux of the Majority's holding rises and falls on its interpretation of *Verbonitz*. There, similar to the instant case, the only evidence the **Commonwealth** presented at the preliminary hearing was that of an investigating police officer who recounted the alleged criminal incident, *i.e.*, the 1987 rape of a seven-year-old child, as it was related to the officer by the victim. The victim did not testify, nor was any other evidence presented. At that time, the district justice ruled that the **Commonwealth** had established a *prima facie* case and bound the defendant over for trial. The defendant thereafter filed a writ of *habeas corpus* in the common pleas court, alleging that he could not be bound over for trial based solely on hearsay evidence. The trial court denied *habeas corpus* relief, and the defendant then filed a petition for review, which the Superior Court denied.

This Court reversed in multiple opinions. The lead opinion, drafted by Justice Larsen and joined by Justices Zappala and Papadakos ("Larsen plurality"), opined that to establish a *prima facie* case, the **Commonwealth** must produce legally competent evidence to demonstrate the existence of each of the material elements of the crime charged, as well as the existence of facts which connect the accused to the crime charged. *Verbonitz*, 581 A.2d at 174. The Larsen plurality, speaking for three Justices, found that hearsay testimony of what the seven-year-old sexual abuse victim told the officer was not legally competent evidence.

This expression was based upon an analysis of the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, which guarantee defendants the right to confront and cross-examine witnesses against them. Observing that the preliminary hearing is a

critical stage of a criminal prosecution, the Larsen plurality found that a defendant possesses the right to confront and cross-examine witnesses who testify against him at a preliminary hearing.[2] *Verbonitz*, 581 A.2d at 174- 75. Accordingly the Larsen plurality concluded that the Superior Court erred in affirming the denial of *habeas corpus* relief, dismissed the charges against the defendant, and discharged him.

As noted, Justice Flaherty filed a responsive opinion ("Flaherty concurrence"), in which Justice Cappy joined, that concurred only in the result of the Larsen plurality and "reach[ed] the same conclusion, through an analysis somewhat different from that employed by the plurality." *Id.* at 175 (Flaherty, J., concurring). Recognizing that there was no federal or state constitutional right to a preliminary hearing, the Flaherty concurrence acknowledged, nevertheless, that our criminal procedural rules afford a defendant a preliminary hearing to determine whether there is a *prima facie* case of the defendant's guilt, and that the defendant is entitled to counsel at that hearing. *Id.* Justice Flaherty then reiterated his prior sentiment, set forth in a responsive opinion in an unemployment compensation case, that "fundamental due process requires that no adjudication be based solely on hearsay evidence." *Id.* at 176 (citing ***Commonwealth**, Unemployment Comp. Bd. of Review v. Ceja*, 493 Pa. 588, 427 A.2d 631, 647 (1981) (Flaherty, J., Concurring)).

Without examining whether any final adjudication is, in fact, rendered at a preliminary hearing, Justice Flaherty opined that his previous expression regarding due process and hearsay evidence applied with equal force to a preliminary hearing in a criminal matter where one's liberty interest is at stake. *Verbonitz*, 581 A.2d at 176. Applying this principle to the facts presented, the Flaherty concurrence opined that the hearsay statement of the police officer was insufficient to demonstrate a *prima facie* case against the defendant as a matter of due process.[3] *Id.*

I acknowledge that the Larsen plurality recognized the Flaherty concurrence's argument in this regard, *Verbonitz*, 581 A.2d at 174, and that the Majority herein relies upon such reference to support its conclusion that there were five votes supporting the due process rationale. I do not agree, however, that the basis of the Larsen plurality's analysis was grounded in due process, as that opinion did not mention the constitutional provisions guaranteeing that right or engage in any substantive discussion as to how due process was violated by the **Commonwealth**'s exclusive reliance on hearsay evidence to demonstrate a *prima facie* case that a crime was committed and that the defendant was the individual who probably committed the crime.

If the Larsen plurality's fleeting reference to due process invoked that doctrine as a basis for its decision, Justice Flaherty would have surely joined that portion of the opinion, as his entire concurrence was based solely on a due process legal theory. As noted throughout, Justice Flaherty did not join any portion of the Larsen plurality and expressly concurred in the result only.[4] Consequently, the Larsen plurality in *Verbonitz* did not receive sufficient votes to garner a majority view and create binding precedent. *See* BLACK'S LAW DICTIONARY (11th ed. 2019), at 1882 (defining a "majority opinion" as "an opinion joined in by more than half of the judges considering a given case"); *A.R.*, 80 A.3d at 1183 (explaining that "plurality opinions, by definition, establish no binding precedent for future cases") (citing ***Commonwealth** v. Brown*, 582 Pa. 461, 872 A.2d 1139, 1165 (2005) (Castille, J., concurring) (citations omitted)). Where the justices participating in the *Verbonitz* decision did not view the basis of the lead opinion as sounding in due process and characterized that decision as a plurality, this Court should not, decades later, stray from the presiding justices' understanding of their own expressions.[5]

II. Pa.R.Crim.P. 542(E)

As noted, also at issue in this appeal is whether Pa.R.Crim.P. 542(E), set forth *supra* at n.1, which was promulgated after this Court's decision in *Verbonitz*, permits the trial court to find a *prima facie* case at a preliminary hearing based solely on hearsay evidence. As also concluded by the Majority, I find that Rule 542(E) is not dispositive of the issue, as it does not address the exclusive use of hearsay evidence to establish a *prima facie* case.

III. Due Process

As the important legal question remains unanswered, I would examine the inquiry anew. Upon careful consideration, I agree with the Superior Court's thoughtful analysis, which concluded that due process is not violated when the **Commonwealth** establishes a prima facie case at a

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preliminary hearing exclusively through the use of hearsay evidence. [6]

The Superior Court observed that due process has both a substantive and a procedural component. Procedural due process is at issue here, as it is undisputed that neither the federal nor state constitution provides an accused with a constitutional right to a preliminary hearing, which would serve as the basis for a substantive due process claim. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (holding that substantive due process protects those fundamental rights that are deeply rooted objectively in the nation's history and tradition).

Critical to a due process inquiry, "the government is prohibited from depriving individuals of life, liberty or property, unless it provides the process that is due." ***Commonwealth** v. Turner*, 622 Pa. 318, 80 A.3d 754, 764 (2013). "While not capable of an exact definition, the basic elements of procedural due process are adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case." *Id.*

While I agree with the Superior Court that these attributes of due process apply to the rule-based right to a preliminary hearing, that does not mean that the full panoply of procedural safeguards present at trial must be afforded at a preliminary hearing, which involves a different stage of the criminal prosecution. [7] *See Finley*, 481 U.S. at 552, 107 S.Ct. 1990 (holding that although states' collateral review procedures must comply with due process, they need not provide post-conviction petitioners with "the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position at trial"). The concept of procedural due process is a "flexible notion which calls for such protections as demanded by the individual situation." *Comm. Dep't of Transp., Bureau of Driver Licensing v. Clayton*, 546 Pa. 342, 684 A.2d 1060, 1064 (1996).

While a preliminary hearing is a critical stage of a criminal proceeding where the right to counsel attaches, *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (plurality), it is not a trial. The principle function of a preliminary hearing is to "protect an individual's right against an unlawful arrest and detention" by placing on the **Commonwealth** the burden of establishing "a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it." ***Commonwealth** v. Weigle*, 606 Pa. 234, 997 A.2d 306, 311 (2010) (quoting ***Commonwealth** v. McBride*, 528 Pa. 153, 595 A.2d 589, 591 (1991)). The evidence supporting a *prima facie* case need not establish the defendant's guilt beyond a reasonable doubt, but must only demonstrate that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to proceed to a jury. ***Commonwealth** v. Karenty*, 583 Pa. 514, 880 A.2d 505, 514 (2005).

Although a preliminary hearing "may permit capable defense counsel to lay the groundwork for a trial defense, its intended purpose is not primarily to provide defense counsel with the opportunity to assess the credibility of **Commonwealth** witnesses, or to prepare a defense theory for trial, or to design avenues for the impeachment of witnesses at trial." ***Commonwealth** v. Sanchez*, 623 Pa. 253, 82 A.3d 943, 984 (2013). Significantly, once the defendant has gone to trial and has been convicted, "any defect in the preliminary hearing is rendered immaterial." *Id.*

Considering these meaningful distinctions between a preliminary hearing and a trial, I agree with the Superior Court that the process due at the preliminary hearing need not be identical to that afforded to a defendant at trial. Hence, I agree with the Superior Court's holding that permitting a *prima facie* case to be established based on pure hearsay evidence satisfies the requisites of due process. I reach this conclusion because Appellant had adequate notice of the charges against him through the criminal complaint, and the use of hearsay in no way affected this notice. He further had an adequate opportunity to be heard. Rule 542 affords defendants the right to "be represented by counsel," to "cross-examine witnesses and inspect physical evidence offered against" him, and to call witnesses and offer physical evidence on his or her own behalf. Pa.R.Crim.P. 542(C)(1)-(4).

Further, Appellant was able to challenge the evidence presented in support of a *prima facie* case by asking the lead investigator questions about the contents of the statements made by the eight-year-old victim, the time of the alleged incident, what other people may have been involved, and when the incident was first reported. Preliminary Hearing Transcript, at 12-24. The nature of the evidence admitted against Appellant via the lead investigator's testimony did not deny him the opportunity to defend himself before a fair and impartial tribunal having jurisdiction over the case. Because credibility is not at issue in a preliminary hearing and the **Commonwealth** need not establish the defendant's

guilt beyond a reasonable doubt, Appellant received at his preliminary hearing the process to which he was due.

Finally, I agree with the Superior Court that the Flaherty concurrence in *Verbonitz*, while facially appealing, is unpersuasive. As noted, Justice Flaherty opined that because due process may require that no adjudication be based solely on hearsay evidence in an unemployment compensation context, the same is true for a preliminary hearing. In discounting this theory, the Superior Court held that while life, liberty, and property may all be at issue if an accused is ultimately convicted at trial, "the preliminary hearing is obviously not a **final** adjudication of those issues." ***McClelland***, 165 A.3d at 31 (emphasis in original). Acknowledging the significant liberty restraints resulting from requiring an accused to stand trial, the Superior Court reasoned that pretrial restraint is governed by the Fourth Amendment and not due process. *Id.* at 32 (citing *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (holding that a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint on liberty); *Manuel v. City of Joliet, Illinois*, ––– U.S. ––––, 137 S.Ct. 911, 917-18, 197 L.Ed.2d 312 (2017) (recognizing that the Fourth Amendment, "standing alone, guaranteed a fair and reliable determination of probable cause as a condition for any significant pretrial restraint") (internal quotation marks and citations omitted)).

This view is consistent with the decisions of federal courts of appeal, which have long held that determinations regarding pretrial restraints on liberty may be made solely on the basis of hearsay evidence. *See, e.g.*, *United States v. Delker*, 757 F.2d 1390 (3rd Cir. 1985) (rejecting a claim that hearsay may not be employed at a pretrial detention hearing to demonstrate that a defendant committed the crime charged); *United States v. Winsor*, 785 F.2d 755, 756 (9th Cir. 1986) (holding that "[a]s in a preliminary hearing for probable cause, the government may proceed in a detention hearing by proffer or hearsay"); *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987) (holding that a government may proceed at a pretrial detention hearing by way of proffer rather than live testimony); and *United States v. Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996) (holding that a defendant had no due process right to require the government to produce its witnesses against him at a pretrial detention hearing).

Accordingly, I would hold that Appellant's due process rights were not violated by the **Commonwealth**'s exclusive reliance on hearsay evidence at his preliminary hearing.

IV. Recrafting our Rules of Criminal Procedure

Although not constitutionally required, this Court can certainly create sensible rules for the use of hearsay at preliminary hearings. As suggested in the *amicus* brief filed by the Office of Attorney General and the Pennsylvania District Attorneys Association, instead of focusing on how much hearsay can be admitted, this Court should focus on what kinds of hearsay are reliable and, thus, sufficiently safe to be admitted for the limited purpose of holding one over for trial. *Amici* suggest three general categories of hearsay that are easily defined and offer elements of reliability that justify their admission for preliminary hearing purposes: (1) audio and video recordings of the victim's statements; (2) testimony by police officers regarding interviews in which they personally participated upon certification that the victim/witness will be available at trial; and (3) expert reports based on scientific analysis or specialized knowledge upon certification that the expert will be available at trial. While I do not today endorse a particular procedure, I find at least superficial appeal to these categories. I would refer this matter to the Criminal Procedural Rules Committee to consider, *inter alia*, these suggestions and make recommendations to this Court regarding the potential amendment of our current criminal rules.

Justice Mundy joins this dissenting opinion.

All Citations

--- A.3d ----, 2020 WL 4092109

Footnotes

1 Chief Justice Nix wrote a dissenting opinion, joined by Justice McDermott, opining the right to confront witnesses is not afforded to defendants at the preliminary hearing stage, and to afford Buchanan such a right "conflicts with the overriding interest this **Commonwealth** has shown in protecting child-witnesses in abuse cases." *Verbonitz*, 581 A.2d at 177 (Nix, C.J., dissenting). Justice McDermott also wrote a brief dissenting opinion, stating a preliminary hearing is not a trial in

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any sense of the word, and the majority's view would "make the first level of judicial process the final one." *Id.* at 177 (McDermott, J., dissenting).

2 We view Paragraph (E) in the context of Paragraph (D), which provides, "At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it." Pa.R.Crim.P. 542(D). Additionally, Paragraph (C) of the Rule provides a defendant shall be present at a preliminary hearing except as otherwise provided in the rules, "and may: (1) be represented by counsel; (2) cross-examine witnesses and inspect physical evidence offered against the defendant; (3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only; (4) offer evidence on the defendant's own behalf, and testify; and (5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical or electronic record of the proceedings." Pa.R.Crim.P. 542(C).

3 In a footnote, the court observed "Pennsylvania courts have used the terms '*prima facie*' and sufficient 'probable cause' interchangeably in the context of modern preliminary hearings." *Ricker I*, 120 A.3d at 355 n.1. Although not at issue in this case, we agree with Chief Justice Saylor's salient observation (in the context of discussing confrontation rights), "[d]efining the *prima facie* standard is not without its complications, particularly given the varying expressions of this Court." *Ricker II*, 170 A.3d at 503 (Saylor, C.J., concurring).

4 The Superior Court determined it had jurisdiction because "extraordinary circumstances" existed to justify accepting the interlocutory appeal in *Ricker I*, and "the issue presented herein directly addresses an issue explicitly unresolved by *Ricker*[*I*;]" *i.e.*, whether permitting hearsay alone to establish a *prima facie* case at a preliminary hearing violates notions of due process. ***McClelland***, 165 A.3d at 22-23.

5 Neither the panel here nor in *Ricker I* expressly analyzed Rule 542(E) under the principles of statutory construction and interpretation. The *Ricker I* court concluded, nevertheless, that a "plain reading" of the Rule permits hearsay to establish "any material element of a crime," and thus, "it follows that, under the rule, [hearsay] is sufficient to meet all of the elements." *Ricker I*, 120 A.3d at 357.

6 The precise language from *Ceja* quoted by both the *Verbontiz* lead and concurring opinions was " '[f]undamental due process requires that no adjudication be based solely on hearsay evidence.' " *Verbonitz*, 581 A.2d at 174 (Larsen, J., lead opinion), *quoting* *Ceja*, 427 A.2d at 647; *Verbonitz*, 581 A.2d at 176 (Flaherty, J., concurring), *quoting* *Ceja*, 427 A.2d at 647.

7 DAP also relies on legal commentary to explain the doctrine:

> It is easy to isolate the narrowest possible ground in those situations where the plurality [lead opinion] relies on rationale A in support for the result, and the concurrence clearly agrees on the applicability of that rationale, but also goes a step further and espouses rationale B as well. In such cases the plurality rationale may be fairly regarded as the narrowest ground embodying the reasoning of a majority of the Court, and that rationale should be binding on lower courts for future cases.

DAP's Brief at 10 n.7, *quoting* Novak, *supra* at 763.

8 An order denying or granting a writ of *habeas corpus* is interlocutory. *See e.g.* ***Commonwealth*** *v. La Belle*, 531 Pa. 256, 612 A.2d 418 (1992). Although the **Commonwealth** now contests the Superior Court's determination that interlocutory appellate review was appropriate in this case, that conclusion is beyond the scope of the issue upon which *allocatur* was granted. Thus, we do not consider it.

9 That grave and doubtful constitutional concerns are evident is beyond peradventure; however, given the limited question on which we granted review, any discussion herein of due process, confrontation rights and whether the probable cause and *prima facie* standards are synonymous, would, of necessity, be *dicta*. Moreover, notwithstanding Chief Justice Saylor's criticisms of the due process analysis in *Verbonitz*, he agrees this case is an inappropriate vehicle for a substantive discussion of the issue and the Chief Justice would thus simply affirm the Superior Court. *See* Concurring and Dissenting Op. at ––––. We reverse the Superior Court, however, on the issue actually raised in this appeal, which implicates that court's prerogative to essentially ignore a prior decision from this Court which clearly articulates hearsay alone is insufficient to establish a *prima facie* case, and where a majority of the justices relied to some degree on due process principles to reach that conclusion.

10 Despite Justice Baer's contrary view in dissent, it is abundantly clear the sole issue in *Verbonitz* was whether hearsay alone is sufficient to establish a *prima facie* case. It is equally and perfectly clear, a five-member majority of that Court held hearsay alone is insufficient to establish a *prima facie* case. Moreover, as the dissent acknowledges, those five justices all invoked a due process rationale by quoting the exact same language from *Ceja*, 427 A.2d at 647: "fundamental due process requires that no adjudication be based solely on hearsay evidence." *Verbonitz*, 581 A.2d at 174 (Larsen, J., lead opinion); *id.* at 176 (Flaherty, J., concurring). Justice Baer minimizes the precedential import of this clear agreement

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among the members of the *Verbonitz* Court by opining that had the lead (plurality) expression by Justice Larsen actually relied on a due process rationale, Justice Flaherty "would have surely joined that portion of the opinion[.]" Dissenting Op. at ——. In our view, however, whatever "sure" reasons existed for the separate expressions, by quoting the identical language from *Ceja*, five justices in *Verbonitz* agreed hearsay alone is insufficient to establish a *prima facie* case due in part to principles of fundamental due process.

11 Dismissal of charges and discharge of the accused for failure to establish a *prima facie* case at the preliminary hearing is an interlocutory order, *see La Belle*, 612 A.2d at 420, which does not implicate double jeopardy concerns. *See Liciaga v. Court of Common Pleas of Lehigh Co.*, 523 Pa. 258, 566 A.2d 246, 267 (1989). Because the **Commonwealth** relied on a reasonable yet imprecise reading of Rule 542, we discharge appellant without prejudice to the **Commonwealth** to refile charges and proceed with a new preliminary hearing.

1 Despite my position, above, I continue to reference the *Verbonitz* opinion as a plurality opinion. This, of course, doesn't mean the opinion necessarily lacks a holding or any shared rationale. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L.Ed.2d 260 (1977) (stating that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [the majority], 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds' " (citation omitted)).

2 Along these lines I note that the Criminal Procedural Rules Committee recently solicited public comment on a proposal that would replace the *prima facie* standard with a probable cause assessment. *See Supreme Court of Pa. Crim. Proc. R. Comm. Notice of Proposed Rulemaking, Proposed Amendments of Pa.Rs.Crim.P. 542, 543, and 1003*, 49 Pa. B. 197 (Jan. 12, 2019). That proposal, however, remains within the Committee's purview after having received comments from the public.

1 Pennsylvania Rule of Criminal Procedure 542(E) provides:

> Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, nonpermitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E).

2 This appeal does not involve a claim based upon the constitutional right to confrontation. Moreover, the right to confrontation has been characterized as a "trial right." *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (providing that "[t]he opinions of this Court show that the right to confrontation is a *trial* right") (emphasis in original).

3 Chief Justice Nix filed a dissenting opinion in *Verbonitz*, joined by Justice McDermott, in which he disagreed with the Larsen plurality's determination that the right to confront witnesses, as guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, required the appearance at the preliminary hearing of the seven-year-old victim of sexual assault and abuse. *Id.* at 176. Chief Justice Nix reasoned that while the **Commonwealth** at the preliminary hearing must show the existence of each of the material elements of the charge, the weight and credibility of the evidence are not factors at this stage and the **Commonwealth** need only demonstrate sufficient probable cause that the person charged committed the offense. Accordingly, the dissent concluded that a trial court may find a *prima facie* case based solely upon hearsay evidence. In addition to joining Chief Justice Nix's dissent, Justice McDermott also filed a separate dissenting opinion, emphasizing that credibility is not at issue at a preliminary hearing. *Id.* at 177.

4 Further, the two dissenting members of the Court in *Verbonitz* also did not view the Larsen plurality as being based upon a due process rationale, as they specifically expressed their disagreement with that opinion's "holding" that the right to confront witnesses as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, was offended by the procedures followed in that case. *Verbonitz*, 581 A.2d at 176.

5 Additionally, this Court has previously characterized *Verbonitz* as a plurality opinion in our criminal rule commentary. *See* Pa.R.Crim.P. 542 *Comment* (providing that hearsay, whether written or oral, may establish the elements of any offense, but contrasting *Verbonitz* as a plurality decision that disapproved of the **Commonwealth**'s reliance on hearsay testimony as the sole basis for establishing a *prima facie* case).

6 The Due Process Clause of the Fourteenth Amendment to the United States Constitution prevents states from depriving "any person of life, liberty, or property, without due process of law ...." U.S. CONST. amend XIV, § 1. Additionally, the Pennsylvania Constitution provides due process protection in Article I, Section 9, which provides:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial

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jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

PA. CONST. art. I, § 9. These two due process provisions have been treated as largely coextensive. ***Commonwealth** v. Sims*, 591 Pa. 506, 919 A.2d 931, 941 n.6 (2007).

7 The right to a preliminary hearing is akin to the right to collateral review of a criminal conviction in that neither right is constitutionally based but, rather, was granted voluntarily by the state. As the High Court has held that a state's process for collateral review, if enacted, must comply with due process, so should the rule-based right to a preliminary hearing include due process protections. *See Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (holding that although states do not have a constitutional obligation to provide for collateral review of a conviction, if states nevertheless provide for collateral review, the procedures for doing so must comport with due process).

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