IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. ____ **EAL 2014**

COMMONWEALTH OF PENNSYLVANIA
Petitioner

V.

WILLIAM J. LYNN

PETITION FOR ALLOWANCE OF APPEAL

Petition to appeal the published decision of the Superior Court of December 26, 2013 at 2171 EDA 2012, vacating the July 24, 2012 judgment of sentence for endangering the welfare of children in the Court Of Common Pleas Of Philadelphia County, Trial Division, Criminal Section, At CP-51-CR-0003530-2011.

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QUESTIONS PRESENTED

1. An Archdiocesan official responsible for protecting children from pedophile priests under his control instead reassigned such a priest, as part of a general scheme of concealment, in a manner that put additional children at risk. Was the evidence insufficient to prove endangering the welfare of children because defendant did not have direct contact with children?

(Answered in the negative by the Superior Court).

2. Assuming *arguendo* defendant could not endanger the welfare of children in his individual capacity, but as part of a general scheme placed a known sexual predator under his control in a position that promoted the risk of further sexual assaults, was the evidence sufficient to convict him as an accomplice?

(Answered in the negative by the Superior Court).

ORDER IN QUESTION

The order in question is found in the published opinion of the Superior Court at 2171 EDA 2012, ___ A.3d ___ (Pa. Super. 2013), vacating the judgment of sentence for endangering the welfare of children and discharging the defendant.

STATEMENT OF THE CASE

Defendant was a high-ranking Archdiocesan official specifically responsible for protecting children from pedophile priests. Instead he relocated them, as part of a general scheme of concealment, in a manner that put additional children at risk of being sexually molested. Here the relocated priest did molest another child, a 10-year-old altar boy. The Superior Court, in a published decision authored by President Judge Bender, held that defendant did not endanger the welfare of children. In so doing that Court applied a supposed holding from a prior case in which no such holding exists, in order to posit a statutory "element" that is not mentioned or discussed in that case or in the text of the statute, and which also does not exist; while ignoring critical statutory language and precedent of this Court directly on point. Review by this Court is warranted.

Monsignor William Lynn was Secretary of Clergy of the Archdiocese of Philadelphia from June 15, 1992 through 2004. In his own words, his "most important" duty in this capacity was to investigate reports of sexual misconduct by priests of the Archdiocese, including cases of sexual abuse of minors, and to protect children from these priests (N.T. 5/16/12, 98; 5/17/12, 32; 5/23/12, 190-193; 199-202; 219-220; 5/24/12, 56, 115). Lynn described himself as the "point man" in such matters (N.T. 5/24/12, 20-21). It was his role to collect and process information, make recommendations, and participate in the decision process of how to deal with the problem of priests within the Archdiocese who were sexual predators against children (N.T. 5/23/12, 197-202, 219-220). Lynn even claimed that his personal efforts

improved the manner in which the Archdiocese handled such issues (N.T. 5/24/12, 59-60).

The evidence told a very different story. Far from protecting children, Lynn engaged in a pattern of concealment and facilitation of child sexual molestation by priests. His misdirection of the public and aid to pedophile priests led directly to the sexual abuse of victim D.G. by Father Edward Avery.[1] Extensive evidence established that Lynn's handling of Avery's case was no oversight, but was in accord with his established practice for dealing with sexual predator priests.[2] The pattern is unfortunately a familiar one. *E.g., Hutchison ex rel. Hutchison v. Luddy*, 742 A.2d 1052, 1056 (Pa.1999) (plurality) (reversing Superior Court grant of judgment n.o.v. in a civil case based on "a longstanding practice [by the Altoona-Johnstown Diocese] of ignoring pedophilic behavior by priests, e.g., by intentionally failing to investigate reports of abuse; refraining from taking disciplinary action against priests known to have abused children; allowing such priests to continue to participate, without supervision, in activities involving children; and concealing from parents reports of ... misconduct"). While it was Lynn's chief duty to investigate and prevent priests from sexually molesting children, his real objective was to conceal the misconduct

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[1] Lynn was to be tried together with Avery and Father James Brennan, but Avery pleaded guilty to conspiracy to endanger the welfare of children and involuntary deviate sexual intercourse before testimony began. Lynn was therefore tried together with Brennan. The jury could not reach a decision in Brennan's case, however, and the scheduled retrial in that matter currently remains pending.

[2] N.T. 3/29/12, 22-25; 4/2/12, 263-266; 4/9/12, 4-7; 4/16/12, 210-213; 4/19/12, 247-249; 5/1/12, 232-234; 5/10/12, 199-202; 5/17/12, 101-104; 6/1/12, 44-47. This evidence is examined in depth in the trial court opinion.

and to avoid negative publicity, notwithstanding the resulting risk of harm to other potential child victims.

Lynn did not merely disregard that risk, he invited it. Despite being responsible for numerous cases of priests who molested children, in no instance did Lynn ever contact the police. He mollified victims by falsely telling them that their allegations were being seriously pursued, while within the system he did the opposite, acting as protector and advocate for the predators notwithstanding his full knowledge of compelling evidence of their guilt. Lynn ignored reports that these priests molested other victims who had not come forward, and never attempted to contact victims who had not already contacted the Archdiocese themselves. He routinely promised victims that their assailants would be kept away from other children while doing nothing to accomplish it. Lynn also invariably arranged for the prompt departure of such priests from their parishes so that they would no longer be visible to victims and their families, consistently arranging for parishioners to be told that the sudden departure was for "health" reasons. Lynn sent sexual predator priests for "treatment" that was ineffective and conducted solely for the sake of appearances. It was Lynn's practice to disregard plans for follow-up supervision recommended by therapists, and to arrange for known sexual predator priests to be reassigned to environments in which they would frequently encounter, and sometimes work closely with, children. He ordinarily kept the priest's new supervisor in the dark. In no instance did he take any steps to require a relocated sexual predator to be kept separated from children. Indeed, in instances in which other priests or nuns raised concerns about questionable

conduct by such predators, Lynn expressed clear disapproval of, and on several occasions retaliated against, the whistleblowers.

In September 1992 Lynn met with R.F., who as a minor had been a victim of sexual abuse by Father Avery. At all times relevant, Lynn was aware of the following information.

When R.F. had been in sixth grade he was an altar server at St. Philip Neri parish and encountered Father Avery, who was "gregarious," "charismatic" and "popular with the young people," and took the altar boys on trips to places such as Wildwood, New Jersey, where Avery had a house. He provided the boys with beer and would enter the loft area where they slept to "wrestle" with them. On at least two such occasions Avery's hand would "momentarily grab [R.F.'s] genitals." Avery was transferred to a different parish but maintained contact with R.F., inviting him to help Avery with his practice of "disc jockeying" at parties. On one occasion in 1978 Avery took R.F., then age 15, to Smoky Joe's Cafe in West Philadelphia to assist him with a party for college students. After the child was drunk on beer Avery took him to the rectory and directed him to "sleep in the bed with me." Sleeping on his back, the boy awoke to find the priest's "hand on top of my penis" over his underwear. Avery's hand then begin to reach inside the underwear, at which point the child rolled away. Because R.F. "hero-worshipped" Avery he "couldn't really accept what had happened" at the time. After R.F. had turned 18, Avery invited him on a ski trip to Killington Vermont with his (Avery's) brother. On this occasion the victim was awakened by Avery massaging R.F.'s penis, leaving the victim "devastated, confused

and angry." With considerable emotional difficulty R.F. contacted the Archdiocese in 1992 because he knew Avery continued to be a "threat to other impressionable young men," and he sought "assurance that Father Avery will not harm anyone else." Lynn told R.F. that the victim was of highest priority to the Archdiocese (N.T. 3/26/12, 259; 4/25/12, 6-25, 32-41). In a subsequent interview with Lynn, Avery first denied the events described by R.F., then admitted it "could be" they occurred under the influence of alcohol (N.T. 3/26/12,270).

Lynn sent Avery to Saint John Vianney, a mental health treatment facility operated by the Archdiocese (Lynn himself was on the board of directors for a number of years), for evaluation and treatment. But in the referral Lynn did not describe the sexual misconduct alleged by R.F., but vaguely alleged only that Avery had been "drinking" and took a minor to a place "serving alcohol." Nevertheless, Avery himself eventually acknowledged his "shame" to his therapist, and admitted that the conduct R.F. reported "must have" happened. The therapist reported "concerns about the existence of other victims," and the facility recommended that as part of "continued outpatient treatment" Avery be placed in an assignment "excluding adolescents" (3/27/12, 18, 42, 48; 5/23/12, 204-205).

Despite these warnings Lynn did nothing to keep Avery separated from adolescents or to protect children from him. To the contrary, Lynn – whose job specifically included participating in the assignment process (N.T. 5/23/12, 195-196) – recommended that Avery be made associate pastor at Our Lady of Ransom, a parish with a grade school. When Cardinal Anthony Bevilacqua declined that proposal,

Lynn recommended assigning Avery to a chaplaincy at Nazareth Hospital. But instead of requiring Avery to live in the hospital residence, Lynn decided he should be allowed to live in a rectory at nearby St. Jerome's parish, another parish with a grade school (N.T. 5/29/12, 109).

Lynn wrote to St. Jerome pastor Joseph Graham, but in that letter said nothing about Avery's sexual misconduct with children. In fact, the letter informed Graham that Avery "had been asked to offer assistance in the parish." Father Graham naturally complied with Lynn's letter and allowed Avery to "assist[ ] in the parish" – he allowed Avery to say Masses at which children were altar servers, and to be with children in the confessional, as Lynn knew he would (N.T. 5/29/12, 110-111).

Lynn did nothing about the therapist's "concerns about the existence of other victims" of Avery, and did nothing to enforce the recommendation that Avery be excluded from contact with adolescents. Other priests at the rectory where Avery lived thought he was there because of overwork (N.T. 4/23/12, 143). Lynn provided no warning to parishioners at St. Jerome, where Avery lived, or to the hospital where Avery was assigned to work. Avery's former parishioners were told that his departure was "for his health."

Meanwhile, Avery disregarded work at both the hospital and at St. Jerome parish in favor of constant disc jockeying at block parties, weddings, dances, and other events. Avery was constantly seeking new bookings and at one point scheduled three for a single weekend (N.T. 3/27/12, 75). This was a serious danger signal because it was the same type of activity Avery had used to groom R.F., the victim

who had contacted the Archdiocese and who had been interviewed by Lynn. To Avery's hospital associates this partying seemed odd given their understanding that he was being treated for overwork; but Lynn rebuffed complaints by Father Michael Kerper, Avery's associate at Nazareth Hospital, telling him to convey his concerns to Kerper's own immediate superior. Nevertheless, in response to a follow-up inquiry from St. John Vianney, Lynn falsely claimed that Nazareth was "very pleased with the work Father Avery is doing." In 1997 Lynn wrote a letter for the signature of the Cardinal to the National Association of Catholic Chaplains that described Avery's work at the hospital as "exemplary." To a secretary at Avery's former parish, Lynn wrote that the Archdiocese had never received "anything but compliments" about him (3/27/12, 45, 57-60, 65-82; 5/23/12, 50-51).

In the fall of 1998, ten-year-old D.G. was training to be an altar server at St. Jerome, where Avery continued to live and say Mass. Within a few months D.G. came to be sexually abused by another of the priests residing there, Father Charles Englehardt. Early in 1999, Avery accosted the altar boy, saying he had heard of his "sessions" with Englehardt and that "ours were going to begin soon." A week later, after D.G. assisted at Mass, Avery told him to stay because their "sessions were going to begin." Avery led the child to a storage room, put on music, and directed him in a "striptease" while watching with an "eerie smile." After the child was naked Avery also undressed and began to fondle him, telling him that "this is what God wants," and that it was time "to become a man." He masturbated the victim and also put his penis in the boy's mouth, then ejaculated on the child's chest and neck. D.G. was

afraid to tell anyone because he thought no one would believe his accusation against a priest (N.T. 4/25/12, 101-136).

The Commonwealth charged Lynn with two counts of criminal conspiracy and two counts of endangering the welfare of children. Following trial before the Honorable Theresa Sarmina, the jury on June 22, 2012 found Lynn guilty of endangering the welfare of children with regard to victim D.G., and not guilty of the remaining charges. On July 24, 2012, the court sentenced Lynn to three to six years imprisonment. On April 12, 2013, the trial court filed a factually detailed and comprehensive opinion addressing the 17 issues raised in Lynn's statement pursuant to Pa.R.A.P. 1925.

On appeal to the Superior Court Lynn raised 10 separate issues, including a claim that the evidence was insufficient because, according to him, his conduct did not amount to "endangering the welfare of children" under the Crimes Code. He was charged and convicted under the pre-2007-amendment version of 18 Pa.C.S. § 4304, stating in pertinent part:

> A parent, guardian or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.[3]

Although the statute states that it applies to a "person supervising the welfare of children," Lynn argued that the evidence was insufficient because it failed to show that he was a supervisor "of children." The Superior Court agreed with this argument,

[3] Under subsection (b) the offense is a third degree felony if there is "a course of conduct of endangering the welfare of a child."

relying on its own en banc decision in *Commonwealth v. Hayle*, 719 A.2d 763 (Pa. Super. 1998) (en banc), which – according to the instant published decision – held that "actual" supervision "of children" is an "element" of the offense (Superior Court opinion, *14-*15). The Commonwealth argued that this Court's decision in *Commonwealth v. Mack*, 359 A.2d 770, 772 (Pa. 1976), requires the statute to be read "by reference to the common sense of the community and the broad protective purposes for which [it was] enacted." The Superior Court, however, concluded that, unlike *Hayle*, *Mack* "offers little guidance" on "interpretation of a specific element" of the statute (Superior Court opinion, *15).

The Superior Court also held that the evidence was not sufficient to convict Lynn as Avery's accomplice. Defendant argued that accomplice liability for endangering the welfare of a child is "redundant" and, somehow, a legal impossibility (defendant's Superior Court brief, 34). The relevant part of the accomplice provision, however, 18 Pa.C.S. § 306(c), states that a person is an accomplice of another in the commission of an offense if "with the intent of promoting ... commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it[.]" The Superior Court concluded that, notwithstanding Lynn's decision to place at risk additional child victims, the evidence was insufficient to prove that he intended the likely consequences of his actions. It concluded by ordering that Lynn be discharged, "forthwith."

As shown below, President Judge Bender's published opinion departs from the law governing statutory construction by inserting limiting words into the text of the

statute, ignoring language in the statute that broadens its application, misstating the content of supposedly controlling Superior Court precedent, and on the basis of that Superior Court precedent disregarding a decision of this Court on point. With regard to accomplice liability, the Superior Court decision misapplies the standard for sufficiency of the evidence by misstating the elements of the crime and viewing the facts in a light most favorable to the defendant.

Published error of this nature is always a serious matter, because it will govern how all statutes are applied, in all future appeals, in trial courts, and at the level of prosecutorial discretion: an erroneous standard of statutory construction may prevent meritorious criminal charges even from being filed. Such tainted precedent can also wrongly negate an unpredictable number of sound criminal convictions. The impact is exacerbated by the high degree of national public attention focused upon this case. The issues here transcend the immediate interests of the parties. Child sexual abuse is a crime in which victims and their families are reluctant to come forward. When, as here, the offenders are educational, religious, or other kinds of social leaders, they often benefit from an institutional policy of concealment designed to protect the institution and to exploit that reluctance. Reversal of the conviction in this case calls into doubt the ability of the criminal justice system to hinder such institutional wrongdoing.

The message sent by the Superior Court's published opinion in this high-profile case is therefore a dismal one – victims of child sexual abuse at the hands of pedophile priests who reluctantly come forward may do so in vain. This Court should

not allow that message to stand unreviewed.

The Commonwealth respectfully requests allowance of appeal.

REASONS FOR GRANTING THE APPLICATION

I. The Superior Court erred in holding that a church official who systematically reassigned pedophile priests in a manner that risked further sexual abuse of children did not endanger the welfare of children.

Lynn handled Avery in the same manner as other child-sexual-predator priests under his authority. Though it was his duty to protect children from them, he put the reputation of the Archdiocese above the safety of potential victims and deliberately subjected children to the risk of being sexually molested. In the words of the Superior Court opinion itself, "the Commonwealth provided ample evidence regarding Appellant's pattern of intentionally mishandling other sexually abusive priests with the intent to shelter both the priests and the larger church from disrepute," supporting a reasonable inference that he did so with regard to Avery (Superior Court opinion, *18). It was indisputable that Lynn endangered children.

Under the plain terms of 18 Pa.C.S. § 4304 it was equally indisputable that Lynn was a "person supervising the welfare of children":

> A parent, guardian or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

Lynn himself said that his "most important" duty as Secretary for Clergy in the Archdiocese was to protect children from sexual misconduct by pedophile priests under his authority (N.T. 5/16/12, 98; 5/17/12, 32; 5/23/12, 190-193; 199-202; 219-220; 5/24/12, 20-21, 56, 115). To conclude that Lynn was a "person supervising the welfare of children" is not a mere characterization or metaphor, but rather a concise

description of his job as he himself described it.

The Superior Court nevertheless held that Lynn committed no crime at all, because he was not a "person supervising the welfare of children." The process by which the Superior Court arrived at this result departed from the legal standard governing statutory construction.

With regard to provisions of the Crimes Code, 18 Pa.C.S. § 105 states in pertinent part:

> The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved.

The Crimes Code is subject to strict construction, but strict construction is irrelevant unless the provision is ambiguous. *Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001) ("The need for strict construction does not require that the words of a penal statute be given their narrowest possible meaning or that legislative intent be disregarded ... nor does it override the more general principle that the words of a statute must be construed according to their common and approved usage"). Here there is no claim of ambiguity.

The Superior Court reasoned that defendant was not within the statutory term "*person supervising the welfare of children*" because he was not "*supervising a child*." Citing its own en banc decision in *Commonwealth v. Hayle*, 719 A.2d 763 (Pa. Super. 1998) (en banc), the Superior Court held that the words "person supervising the welfare of a child" define "actual/direct supervision of a child" as an "element" of the offense (Superior Court opinion, *14-*15). Since the evidence did not prove

this supposed "element" of "actual" or "direct" supervision of a child, the Superior Court said, defendant could not have been guilty of endangering the welfare of children, because it was Avery who molested the child victim, and defendant supervised Avery, not the child.

This reasoning ignores the ordinary import of the statutory language. One who acts in a capacity of protecting children and who supervises another who has contact with those children, is a supervisor of the welfare of children. The statute does not suggest modifiers such as "direct" or "actual" in its use of the word "supervising." As even the Superior Court stated – although apparently without awareness of the significance of saying so – it is sufficient that the person was "responsible for the supervision" of a child (Superior Court opinion, *16). Lynn was indeed "responsible for the supervision" of children. His conduct was no less "supervision" because it was accomplished through a subordinate, from whom Lynn was specifically responsible for protecting children against sexual molestation. "Supervision" as ordinarily understood is routinely accomplished through subordinates. School principals, for example, or managers of day care centers, supervise the welfare of children; their supervision is no less "actual" if they do not personally encounter the children. Lynn endangered the welfare of children, including victim D.G., by breaching his undisputed duty to prevent priests under his supervision, such as Avery, from sexually molesting them.

President Judge Bender's published opinion deciding otherwise depends not on the plain language of the statute, but on the existence of a supposedly unmet

statutory "element" of "actual" or "direct" supervision. The Superior Court derived this supposed element by inserting a word that does not appear in the text of the statute – "direct" – to modify the word "supervising."

Unmodified, the word "supervising" facially includes any kind of supervising, including, as here, supervision through a subordinate. Aside from the fact that the statute says exactly nothing that would *exclude* supervision that is not sufficiently "actual," there is nothing about Lynn's supervision of children's welfare that rendered this supervision something other than "actual." Indeed, if the term "supervising" did not include *all* forms of supervision there would be no need for the Superior Court to supply a missing word such as "actual" or "direct" in order to limit "supervising." But the word "actual" (or "direct") simply is not there. There is no "element" of "actual" supervision in the plain words of the statute.

Contrary to the Superior Court's reading, moreover, the actual and unmodified text of the Crimes Code refers to a "person supervising *the welfare of* a child," not a "person supervising *a child*." In ordinary English grammar the verb in the phrase "person supervising the welfare of a child" is "supervising," and the object of the verb is "the welfare of a child," not "a child." That which is supervised is the *welfare* of children. The Superior Court's construction of the statute, which requires "actual supervision of children," renders the words "the welfare of" meaningless. They are utterly without function or purpose if, as the Superior Court held, the phrase really means "supervising a child." The General Assembly could easily have said "supervising a child" but instead used the broader phrase "supervising *the welfare of*

a child." By rendering the words "the welfare of" meaningless, the Superior Court effectively rewrote the statute, in violation of settled principles of statutory construction. *Triumph Hosiery Mills, Inc. v. Commonwealth*, 364 A.2d 919, 921 (Pa. 1976) ("The Legislature cannot be deemed to intend that its language be superfluous and without import"); 1 Pa.C.S. § 1921(a) (directing courts to interpret statute in a way that gives effect to all its provisions); 1 Pa.C.S. § 1922(2) (requiring the presumption that the legislature intends "the entire statute to be effective and certain").

In insisting that "person supervising the welfare of a child" means "person directly or actually supervising a child," the Superior Court concluded that the purpose of the word "welfare" is merely to refer to "a child's overall well-being." Thus, the explanation goes, the Superior Court was not treating "welfare" as surplusage because it recognized that "welfare" is broader than mere freedom from injury. But the question here is the use of the word "welfare" in a specific context, not its general meaning. The statute imposes criminal liability on a "person supervising the welfare of a child [who] knowingly endangers the welfare of the child." What is significant in the "person supervising" iteration is that "the welfare of a child" expands the scope of "person supervising" and broadly defines the actors to whom the statute applies. It is in this context, the critical one, that the Superior Court treats "the welfare of" as surplusage. If "person supervising the welfare of a child" were really intended to mean "person supervising a child," the words "the welfare of"

would not only serve no purpose, but would be pointlessly confusing.[4]

That the words "supervising the welfare of a child" are broader than "supervising a child" is consistent with the purpose – a mandatory factor in statutory construction under 18 Pa.C.S. § 105 – of the provision. This Court explained in *Commonwealth v. Mack*, 359 A.2d 770, 772 (Pa. 1976), that the endangering the welfare of children statute is "basically protective in nature," and that such statutes "are necessarily drawn broadly" because it is "impossible to enumerate every particular type of adult conduct against which society wants its children protected." For this reason, this Court ruled that the statute must be applied in each case in accordance with "[t]he common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain."

The endangering the welfare of children statute has been in force since the Crimes Code became effective, June 6, 1973, yet in 40 years President Judge Bender's published opinion is the first ever to detect a supposed "element" of "actual supervision" in this offense. The alleged precedent that the Superior Court cites as supposedly finding and applying this supposed "element," *Hayle*, did not apply it, did

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[4] In a footnote, the Superior Court asserts that under the Commonwealth's argument, it supposedly is the term "supervising" in "person supervising the welfare of a child" that would be "rendered superfluous" by giving effect to the words "the welfare of" (Superior Court opinion, *16 n.19). This contention is difficult to understand. Giving "person supervising the welfare of a child" its plain meaning does not in any way diminish the meaning of the word "supervising," much less render it "superfluous." Rather, giving all of the words of the provision their plain and ordinary meaning *broadens* the meaning of "supervising." The real difficulty with this plain-meaning construction, in the Superior Court's view, appears to be that it conflicts with the narrow construction that the Superior Court prefers.

not find it, and did not even mention it.

In *Hayle* the offender was a visiting "second or third" cousin of the victim's family who left the other adults on the pretense of going to the bathroom, and sexually molested one of several children who were in a separate bedroom. In holding that this evidence failed to prove endangering the welfare of children, the en banc Court reasoned that Hayle was a mere visitor who had not been asked or expected to supervise anyone. The opinion in *Hayle* says nothing about "actual" supervision – the word "actual" does not even appear – much less does it deem "actual" supervising a supposed "element" of the offense. The decision did not conclude that Hayle was supervising *too indirectly*, but that he was not supervising *anything at all*. *Hayle* is consistent only with the tautological conclusion that sexually molesting a child does not make the assailant a person "supervising the welfare of a child."

That *Hayle* did not define a supposed element of direct supervision is confirmed by the fact that, in 2002 – four years ***after*** *Hayle* was decided – in *Commonwealth v. Wallace*, 817 A.2d 485 (Pa. Super. 2002), the Superior Court, in an opinion authored by the Honorable John T. Bender, recited each of the individual elements of endangering the welfare of children. But the supposed "direct supervision" element supposedly found in *Hayle* was not there:

> [T]o support a conviction under the EWOC statute, the Commonwealth must establish each of the following elements: "(1) the accused is aware of his/her duty to protect the child; (2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and (3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Wallace, 817 A.2d at 490-491, citations and internal quotation marks omitted. If, as the instant published Superior Court decision claims, the en banc decision in *Hayle* defined a "direct supervision" element of the offense, it is strange that no such element is mentioned four years later when *Wallace* recited the elements of the offense.

President Judge Bender's inaccurate representation of *Hayle* in this case is all the more significant because it is presented as the justification for disregarding precedent of this Court. In *Mack* this Court held that the statute is to be broadly construed – guidance that should certainly have been followed by the Superior Court. Instead, to justify its conclusion that *Hayle* controls but *Mack* does not, the Superior Court states that *Mack* provides "only a general outline of the legislative purpose" in the context of a claim of unconstitutionality for vagueness; whereas *Hayle*, according to President Judge Bender's published opinion, "directly confronted the legal issue" of "whether the accused must be a supervisor of a child," and found "actual supervision of children to be an element of the offense" (Superior Court opinion, *15).

But the Superior Court's description of *Hayle* is simply not true. As already noted, *Hayle* never even referred to, let alone "directly confront," that supposed issue, nor did it in any way suggest that "actual supervision of children" is "an element of the offense."

Moreover, the Superior Court's assertion that *Mack* "offers little guidance" (*id.*) because it concerned a vagueness claim makes no sense. In deciding the

vagueness claim this Court determined that it was the intent of the General Assembly for the statute to be read broadly to effectuate its protective purpose. That legislative intent does not somehow disappear when the issue is sufficiency. Indeed, under 1 Pa.C.S. § 1921, the very fact that *Mack* dealt with a vagueness claim invoked such factors as the "occasion and necessity for the statute," the "mischief to be remedied," and the "object to be attained," all of which militate in favor of broad construction in order to protect children. *Mack* therefore is all the *more* significant, especially since the Superior Court's analysis here depends on reading the statute narrowly. Contrary to this Court's ruling, the Superior Court's constricted reading ignores broad statutory language and applies limiting words not found in the text.

This opinion is therefore something truly remarkable. It expressly disregards a decision of this Court concerning how the statute is to be read, *Mack*, in favor of following an unreal construct of a case *not* on point, *Hayle*. It purports to follow a supposed holding of *Hayle* that, in fact, does not even exist, derived from *Hayle's* supposed "direct confront[ation]" of an issue that, in fact, was never even mentioned in that case, in order to posit a statutory "element" that also was not mentioned or discussed in that case. This supposed "element" likewise does not exist. It is not found in the statute and was never before detected by any Pennsylvania court, even though the statute has been in effect since 1973. According to the Superior Court the occult presence of this "element" is predicated on an unreal construct of the statute that depends on applying limiting words ("actual" or "direct") *not* found in the text of the provision, while ignoring broadening language ("the welfare of") that *is* in the

provision. Based on all of these *completely nonexistent* factors, this published decision concludes, as a matter of law, that a statute designed to flexibly apply to a wide variety of conduct that endangers children, did not extend to defendant's conduct that *systematically* endangered children.

It would be a daunting challenge to find a more comprehensive misapplication of the law or a more complete departure from the plain language of the statute.

Defendant will likely argue that allowance of appeal is unwarranted because the statute was subsequently amended to address his conduct. In January 2007 the General Assembly amended § 4304 to add the words "or a person that employs or supervises such a person" to the phrase "person supervising the welfare of a child," such that the critical language going forward is, "person supervising the welfare of a child or a person that employs or supervises such a person."[5] Because the 2007 amendment, which did not apply in this case, supposedly supplies what was missing from the 1973 version of § 4304, and would supposedly suffice to convict someone who in the future acted as Lynn did here, the argument will go, the instant Superior Court ruling can affect only a small and diminishing number of cases and is beneath this Court's attention.

Unfortunately, none of this is correct. This published decision of the Superior

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[5] The amendment followed the recommendation of the September 2005 report of the first Investigating Grand Jury in this case that such language would afford greater clarity (2005 Grand Jury report, 75). Since, as shown above, the ordinary meaning of "supervising the welfare of a child" already encompassed such conduct, the amendment reinforced the already-existing legislative intent. *See Commonwealth v. Corporan*, 613 A.2d 530, 531 (Pa. 1992) (noting revision of drug sentencing statute to more clearly state what had already been manifest in the prior provision).

Court concludes as a matter of statutory construction that § 4304 requires "actual" or "direct" supervision of a child by the offender (Superior Court opinion, *14), even though words such as "actual" or "direct" are not found in the text of the statute. It makes no difference, then, that the words "actual" or "direct" also do not appear in the text of the *amended* statute. Since under the Superior Court's analysis they were implicit in the original version, the same must be true of the amended version. Indeed, since at the time of the 2007 amendment the Superior Court had yet to reveal that "direct" or "actual" supervision was a supposed "element" of the offense, the legislature could not have intended to remove it.

It is therefore not merely possible, but certain, that anyone charged under the amended statute will argue under this published Superior Court decision that "person supervising the welfare of a child or a person that employs or supervises such a person" must be read to mean "person *directly and actually* supervising the welfare of a child or a person that *directly and actually* employs or supervises such a person."

Under the Superior Court's erroneous construction even the amended statute would not have applied to Lynn's conduct. Lynn obviously did not "employ" pedophile priests, and it is by no means clear that his supervision of them, for the purpose of preventing their sexually molesting children, would be considered sufficiently "actual" or "direct" under the Superior Court's understanding of those terms – terms that, in addition to being nonexistent, are entirely *undefined*. How to distinguish mere "supervision" from "actual" and "direct" supervision remains entirely unknown. Of course, under the broad reading required by *Mack*, Lynn's

conduct was a crime under *both* versions of the statute; but this Superior Court ruling rejects *Mack* as a case that affords "little guidance," and instead indicates that there was *no crime at all* – in terms that would require the same outcome under *either* version of the statute.

Thus, as long as this published Superior Court decision stands, the 2007 amendment cannot be relied on to protect children. The problem is not in the statute, but in the Superior Court's wholesale departure from the rules of statutory construction, in a manner that edits the statute to insulate Lynn and people like him from criminal liability. It is a problem that will certainly continue unless this Court intervenes.

This Court should grant allowance of appeal.

II. If, as the Superior Court held, it was legally impossible for defendant to endanger the welfare of children in his individual capacity, the evidence was sufficient to prove his guilt as an accomplice.

Lynn was guilty as a principal. But even granting *arguendo* the Superior Court's erroneous conclusion that he could not be guilty because he was not within the class of persons defined by "person supervising the welfare of a child," he was *necessarily* guilty as an accomplice.

It is sufficient for accomplice liability "if [the offender] acts with the intent of promoting or facilitating the commission of an offense and agrees, aids, or attempts to aid" another in committing that offense. *Commonwealth v. Spotz*, 716 A.2d 580, 585 (Pa. 1998). This Court has held that "[t]he least degree of concert or collusion is sufficient to sustain a finding of responsibility as an accomplice." *Commonwealth v. Coccioletti*, 425 A.2d 387, 390 (Pa. 1981). The necessary proof may be inferential and circumstantial. *Commonwealth v. Bachert*, 453 A.2d 931, 935-936 (Pa. 1982). No agreement is required; "only aid is required." *Commonwealth v. Graves*, 463 A.2d 467, 470 (Pa. Super. 1983). It is not a defense to accomplice liability that the offender is not himself within the class of persons who can commit the underlying offense. 18 Pa.C.S. § 306 states in pertinent part:

> **(e) Status of actor.--**In any prosecution for an offense in which criminal liability of the defendant is based upon the conduct of another person pursuant to this section, it is no defense that the offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

See United States v. Ruffin, 613 F.2d 408, 413 (2d Cir. 1979) ("a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal").

According to the Superior Court's analysis here, the sole impediment to defendant's guilt as a principal was that he supposedly could not commit the offense in an individual capacity, because it supposedly applied only to "direct" supervisors "of children." But for *accomplice* liability defendant did not need to be a supervisor of *any* kind. Logic dictates that one *not* in the defined class who facilitates another who *is* in that class, in fulfilling all remaining elements of the underlying offense, is *necessarily* guilty as an accomplice. That is the case here. The "not of the class is no defense" clause of 18 Pa.C.S. § 306, as well as the interplay between this clause and the underlying offense of endangering the welfare of children, appears to be a matter of first impression in this Court under the Crimes Code.[6]

It is important to note that the essence of the underlying offense is *endangering*. It requires the offender to *risk*, not *cause*, harm. There is no requirement

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[6] *See Commonwealth v. Weldon*, 48 A.2d 98, 101 (Pa. Super.1946) (Under the Penal Code, where principal's employment in a bank was an essential element of the offense, Weldon could be convicted as an accessory even though not an employee); *United States v. Lester,* 363 *F.*2d 68, 72-73 (6th Cir.1966) (private citizens properly convicted as accomplices of police officers acting under color of state law to deprive third party of civil rights, even though officers were acquitted); *State v. Hinds*, 674 A.2d 161, 166 (N.J. 1996) ("a private person may be an accomplice to official misconduct"); *State v. Cordero*, 851 P.2d 855, 859 (Ariz. Ct. App. 1992) (passengers not driving stolen car could be guilty of flight as accomplices); *People v. Evans*, 58 A.D.2d 919, 396 N.Y.S.2d 727, 728 (N.Y., 1977) (female offender properly convicted of rape as accomplice; "the fact that she is legally incapable of committing such an offense in her individual capacity has no effect").

that a specific victim be placed in danger. *See Commonwealth v. Lawton*, 414 A.2d 658, 662 (Pa. Super. 1979) (reckless endangerment "does not require any particular person to be actually placed in danger, but deals with potential risks"). As explained in *Wallace*, "the statute does *not* require the actual infliction of physical injury" or require "that the child or children be in imminent threat of physical harm." What is proscribed "is the awareness by the accused that his violation of his duty of care, protection and support is practically certain to result in the endangerment." 817 A.2d at 491-92 (emphasis original, citation and internal quotation marks omitted).

Because there was no requirement that Avery intend actual harm to the victim to violate § 4304, there likewise was no requirement that Lynn actually intend harm to the victim to be guilty as an accomplice. "For offenses where a principal actor need not intend the result, it is also not necessary for the accomplice to do so." *Commonwealth v. Roebuck*, 32 A.3d 613, 624 (Pa. 2011). Indeed, under the "express design" of the Model Penal Code on which the Pennsylvania accomplice liability statute, 18 Pa.C.S. § 306, is based, "it certainly is possible for a state legislature to employ complicity theory to establish legal accountability on the part of an accomplice for foreseeable but unintended results caused by a principal." *Id.* at 617.

The evidence is therefore sufficient if it supports an inference that Lynn's promoting or facilitating "violation of [a] duty of care" by Avery was "practically certain to result in ... endangerment." *Wallace*, 817 A.2d at 492. Here there was abundant evidence that defendant facilitated Avery's violation of a duty of care and that this was practically certain to endanger the welfare of children. There was no

burden on the Commonwealth to prove that Lynn specifically intended for Avery to sexually molest a particular child victim.

Knowing that Avery should be in an assignment "excluding" adolescents, Lynn arranged for Avery to live in a parish with a grade school (N.T. 2/27/12, 18, 42, 60; 4/25/12, 99; 5/23/12, 204-205). Lynn told the pastor that Avery should "assist[] in the parish," and so Avery encountered children in the confessional and said Masses at which children were altar servers, just as Lynn knew he would (N.T. 5/29/12, 110-111). Having placed Avery at the head of his list of priests "guilty of sexual misconduct with minors" (N.T. 3/27/12, 188-189; C-52A), and after being twice notified that follow-up treatment for Avery recommended by the St. John Vianney facility had never taken place, Lynn learned that Avery had resumed his practice of disk-jockeying. This was the same conduct Avery had used to groom R.F., his previous victim. Lynn was advised that Avery was ignoring his real work in favor of this activity, at one point booking three such engagements on a single weekend, and failing to work 25 out of 31 Saturdays at Nazareth Hospital (N.T. 3/27/12, 63-71, 75; 4/23/12, 154-155). But Lynn responded by only providing more cover for Avery. When Avery's supervisor Father Kerper reported these concerns, Lynn – who remained responsible for protecting children from Avery – told him to take his complaints elsewhere (N.T. 3/27/12, 76; C-69). Despite being extraordinarily well aware of the dangerous implications of Avery's actions, Lynn merely told Avery to be "more low-key" in the future. He recognized that Avery was "minimizing ... the allegations against him," even while at the same time describing Avery to outsiders

as "hard working" and "trustworthy" (*Id.*, 85-92; C-78, C-80, C-83).

In nevertheless reaching the counterintuitive conclusion that the evidence was *not* sufficient for accomplice liability, the Superior Court posited that, to prove the required mental state, the Commonwealth had to prove that Lynn's concern for the reputation of the Archdiocese or pedophile priests was "indistinguishable or interchangeable" with his intent to facilitate the danger Avery posed to children (Superior Court opinion, *18). In terms of sufficiency of the evidence this assertion is incoherent. The Commonwealth had no such burden, and there is no discernable, rational reason to supposed that it did. That *the defendant* sought to excuse his criminal conduct in these terms is irrelevant. A criminal does not honestly announce his criminal intent. It is almost always necessary "to look to the act itself to glean the intentions of the actor." *Commonwealth v. Hall*, 830 A.2d 537, 542 (Pa. 2003).

This Court's admonition in *Commonwealth v. Ratsamy*, 934 A.2d 1233, 1235 (Pa. 2007), in reversing a decision authored by then-Judge Bender, stated that sufficiency does not "require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt" (original emphasis, citation and internal quotation marks omitted). Here the Superior Court nevertheless relied on a remarkably selective reading of the record in defendant's favor.

According to the Superior Court "[t]here was no evidence that Appellant had any specific knowledge that Avery was planning or preparing to molest children at St. Jerome's" (Superior Court opinion, *19). But as a matter of law, evidence of "specific knowledge" of "planning or preparing" was *unnecessary* to prove Lynn's

guilt as an accomplice, just as it was unnecessary to prove Avery's guilt as a principal. *Commonwealth v. Roebuck*, 32 A.3d at 624 ("For offenses where a principal actor need not intend the result, it is also not necessary for the accomplice to do so"). As noted above, the evidence showed that defendant knew the *risk*, and that he concealed, exacerbated, facilitated and promoted the danger posed by Avery. That was sufficient to prove his guilt as an accomplice.

The Superior Court stated that "Avery was not even diagnosed with a mental impairment that suggested he had a predisposition to commit sexual offenses" (*Id.*). This borders on sophistry. Defendant had extensive experience with pedophiles because it was his job to protect children from pedophile priests. He himself stated that he had "seen where a person is not diagnosed as a pedophile and yet has engaged in acts of pedophilia" (N.T. 5/23/12, 91, 219). Thus, even though a psychologist had opined that Father Nicholas Cudemo was not a pedophile, *defendant* designated him a pedophile because he knew Cudemo was a threat to children (N.T. 5/3/12, 179; 5/24/12, 81). He likewise put *Avery* at the top of his list of priests who were "guilty of sexual misconduct with minors" (N.T. 3/27/12, 188-189; C-52A). Defendant was on the board of directors at the facility owned by the Archdiocese that attempted to treat pedophile priests (N.T. 5/23/12, 204-205). He was quite literally an expert on the subject. To suggest that he was unaware that Avery was dangerous to children would be frivolous under *any* standard of review. For the Superior Court to so conclude as a matter of the sufficiency of the evidence is incomprehensible.

The Superior Court stated that "there was no evidence that Avery had resumed

drinking, or that Appellant knew of such behavior." But defendant certainly knew Avery was ignoring his assigned work in favor of resuming his practice of disk-jockeying with a vengeance, the same conduct he had used to groom his previous victim (N.T. 3/27/12, 63-71, 75; 4/23/12, 154-155). The Superior Court appeared to have no awareness that the risk at issue was not whether Avery might drink, but whether he might sexually abuse another child.

The Superior Court went on, asserting that "Avery was appointed to a chaplaincy so as to limit his contact with children" (*Id.*). But defendant *undermined* that plan, which would have allowed Avery to live at Nazareth Hospital, by unnecessarily sending Avery to live in a parish *with a grade school*.

The Superior Court nevertheless claimed to be unable to find any "evidence that Appellant explicitly or implicitly approved of Avery's supervision of minors at St. Jerome's," when in fact, the evidence established that Lynn *knew* that his letter to the pastor, telling him that Avery should provide "assistance," would result in Avery contacting minors in confession and at Masses (N.T. 5/29/12, 110-111).

Remarkably, the Superior Court found that defendant actually "extinguish[ed] the risk" posed by Avery because "the Commonwealth's own evidence" showed that the pastor "was told" that Avery "was not to be around children." In support of this argument the Court cites " N.T., 5/23/12, at 50." In fact, that page of the record states that the pastor was told this "by the Archdiocese." Further, that knowledge did nothing to negate the effect of the letter *defendant* sent to the pastor indicating that Avery *could* encounter children, or the fact that defendant *knew* the letter would lead

to that result. Moreover, the very same page of the record establishes that: (a) the pastor was *not* Avery's supervisor; (b) the pastor "*knew nothing*" about Avery's aftercare therapy; and (c) contrary to theraputic recommendation, *no* system of accountability had been put in place for Avery (N.T. 5/23/12, 50).

The Superior Court opinion concluded by stating that the evidence "was not sufficient to support the notion that the natural and probable consequence of Appellant's conduct was Avery's intentional act of molestation (which was the only conduct that could have given rise to Avery's EWOC violation)." But since the offense was *endangering* the welfare of a child, the Superior Court's assertion that an "intentional act of molestation" was the "only" conduct that could possibly establish it is again incoherent, and indeed, indicates that the Court did not clearly understand the offense in issue. As then-Judge Bender himself wrote in *Wallace*, the offense of endangering the welfare of children (and thus, accomplice liability for the same offense) "does *not* require the actual infliction of physical injury." 817 A.2d at 491 (emphasis original). This Court held in *Commonwealth v. Roebuck*, a case the Superior Court opinion ignores, that where an actor need not intend a particular result to be guilty as a principal, that intent is equally unnecessary to prove guilt as an accomplice. While the *severity* of defendant's crime was certainly exacerbated when Avery actually sexually molested another child, that event was only the inevitable result of criminal conduct by defendant that was *already* sufficient to prove the offense. The Superior Court's analysis thoroughly misunderstands and misapplies the law.

In *Commonwealth v. Davidson*, 938 A.2d 198, 209-210 (Pa. 2007), this Court explained that it is the policy of this Commonwealth to protect children from sexual abuse, and that this is "a government objective of surpassing importance" (citations omitted). Earlier, in *Commonwealth v. Mack*, this Court found a similar legislative protective purpose controlling in the specific context of endangering the welfare of children, as a matter of the law of statutory construction.

The policy of this State, as expressed by the General Assembly, and the above rulings by this Court, might as well not exist under the instant, published Superior Court decision.

In this case the defendant systematically put children in danger of sexual abuse by pedophiles and facilitated the risk to children posed by Avery – one of the many men defendant was responsible for protecting children *from*. Yet the Superior Court insulated defendant from criminal liability as a principal by inventing statutory language that does not exist, ignoring language that does, applying a nonexistent holding from a prior decision, and applying a nonexistent statutory element. As for accomplice liability, the Superior Court systematically misapplied the standard of review for sufficiency of the evidence. It again assumed the existence of statutory elements that do not in fact exist, ignored facts indicative of guilt, and read the record only for the purpose of finding inferences in the defendant's favor. It uttered this serially erroneous legal analysis in a decision that was not only published, but one that is the subject of national attention, in a matter of great importance as a matter of public policy. This Court should grant allowance of appeal.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to grant allowance of appeal.

Respectfully submitted,

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