IN THE

Supreme Court of Pennsylvania

Eastern District

No. 26 EAL 2014

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM J. LYNN,

Respondent

RESPONDENT'S ANSWER IN OPPOSITION TO THE PETITION FOR ALLOWANCE OF APPEAL

Answer in Opposition to Petition for Allowance of Appeal from the Published Opinion and Order of the Superior Court of Pennsylvania at No. 2171 EDA 2012, Filed December 26, 2013, vacating the July 24, 2012 judgment of sentence for endangering the welfare of a child in the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, at CP-51-CR-0003530-2011

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REASONS FOR DENYING THE PETITION

I. The Superior Court's holding in this case is well-reasoned, correct, and consistent with long-standing precedent in that Court. The Commonwealth wilfully distorts the Superior Court's actual holding, which simply concluded that the pre-amended endangering the welfare of a child "EWOC" statute, 18 Pa. C.S.A. § 4304, which formed the basis of Respondent's single conviction, did not apply to him as he was neither a parent, guardian, nor other person supervising the welfare of a child. Furthermore, the Superior Court held that the Commonwealth did not present sufficient evidence upon which to conclude that Respondent was an accomplice to EWOC.

II. The Commonwealth misrepesents and misapplies the precedential case law that governs the present case.

III. The Commonwealth's account of the perils of the precedent set by the Superior Court's decision is baseless and illogical. There is no need for this Court to consider this petition. In the aftermath of the 2007 amendment to the EWOC statute, which includes a new category of potential defendants, there will be very few, if any, prosecutions like this case, based on the old version of the statute. This Court's precious resources would be wasted on considering a case with no prospective value.

TABLE OF AUTHORITIES

Cases

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I. COUNTER- STATEMENT OF QUESTION INVOLVED

1. Whether the trial court erred in allowing the jury to deliberate on whether Respondent William J. Lynn ("Respondent") can be liable for endangering the welfare of children ("EWOC") -- as a principal or an accomplice -- when the Commonwealth failed to provide sufficient evidence to meet its burden of proving that Respondent violated each element of the crime, as either a principal or an accomplice?

SUPERIOR COURT ANSWER: YES

II. ORDER IN QUESTION

The order in question is found in the published opinion of the Superior Court at 2171 EDA 2012, 2013 PA Super 328, ---A.3d---, 2013 WL 6834765 (Pa. Super. Dec. 26, 2013), vacating the judgment of sentence for endangering the welfare of children and discharging Respondent forthwith.

III. COUNTER-STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In the spring of 1992, R.F., then 29 years of age, wrote to Msgr. Jagodzinski, then-Secretary for Clergy in the Archdiocese of Philadelphia ("Archdiocese"), about the instances of molestation he suffered as a teenager in the 1970s at the hands of a priest, Edward V. Avery ("Avery".) [R. 846a-850a.] [1] No one followed up with R.F. until September, 1992, when Monsignor William Lynn ("Respondent"), the new Secretary for Clergy, discovered the letter. [R. 851a.] Respondent promptly answered R.F. and scheduled a meeting with him for October, 1992. [*Id.*, R. 853a-855a.] R.F. indicated that Avery had been a close friend of R.F. and his family for many years, a relationship which began when Avery was a priest in the parish to which R.F.'s family belonged. [R.853a-855a.] R.F. continued to spend time with Avery even after Avery moved on to a new parish assignment, and during one such visit, when R.F. was 15, R.F. assisted Avery with a disc jockeying event that Avery put on at a University of Pennsylvania bar. [*Id.*] Both became inebriated and returned to Avery's rectory, mere blocks away, at the conclusion of the event. [*Id.*] During the night, Avery and R.F. shared a bed, and Avery groped R.F. [*Id.*] Upon hearing R.F.'s story, Respondent confronted Avery. [R. 856a-860a.] At that time, R.F. was Avery's only known victim. Though Avery denied abusing R.F., Respondent recommended to Cardinal Bevilacqua, then-Archbishop of Philadelphia, that Avery undergo an assessment at the Anodos Center of the St. John Vianney psychiatric hospital. [R. 863a-869a, 872a-873a.] Heeding the Anodos report - which diagnosed Avery with alcohol abuse – Respondent recommended to Cardinal Bevilacqua that Avery receive inpatient treatment at

[1] *See* Attachment A to the 4/12/13 lower court opinion, supplied by the Commonwealth in support of its present Petition for Allowance of Appeal ("Petition"), which provides an organizational chart for the Archdiocese of Philadelphia. The Office of Secretary for Clergy was one of six offices overseen by the Vicar for Administration. The Office of Vicar for Administration, the Regional Vicars, and the Advisory Bodies all stood between Office of Secretary for Clergy and the Archbishop of Philadelphia in the hierarchy of the Archdiocese. Respondent served as Secretary for Clergy from June 1992 until June 2004.

St. John Vianney. [R. 874a-876a, 878a-890a.] Avery was hospitalized for more than 8 months. [R. 893a-894a, 906a, 913a-914a.] During assessment and hospitalization, Respondent kept R.F. apprised of Avery's status and progress – Respondent even facilitated an opportunity for R.F. to confront Avery in the hospital, at R.F.'s request. [R. 901a, 906a, 1102a, 1108a.]

At discharge, the experts of St. John Vianney confirmed Avery's Anodos diagnosis, indicating that alcohol abuse was Avery's problem. [R. 913a.] Dr. Wayne L. Pellegrini, Ph.D., even emphasized that no diagnosis of a sexual disorder can be given. [*Id.*] The treatment team advised Respondent that Avery was fit to return to ministry. [*Id.*] Significantly, per Cardinal Bevilacqua's policy[2], only priests diagnosed with pedophilia and ephebophilia were permanently removed from ministry. [R. 5405a, (N.T. 5/23/12, p. 92.)] By contrast, Avery was not diagnosed with any sexual disorder at all, and Cardinal Bevilacqua reassigned him. [R. 913a.] The trial record is clear, as the Superior Court has recognized, that in his capacity as Secretary for Clergy, Respondent did not have direct authority to transfer, remove, or even restrict the nature of a priest's ministry. [R. 5401a, (N.T. 5/23/12, p. 77.)] [Superior Court Opinion, "Opinion," *1.]

Respondent made every effort to place Avery in an assignment consistent with the recommendations of the professionals at St. John Vianney – a ministry that did not necessitate regular direct contact with children or vulnerable minorities. [R. 914a.] Respondent looked for a small parish with a strong pastor and chaplaincy assignments to ensure that Avery would be monitored properly and kept away from children and adolescents.[3] [*Id.*] Respondent instructed Avery to give up his special ministry with the Hmong community. [R. 951a.] Ultimately, Cardinal

[2] It is not in dispute that only Cardinal Bevilacqua set and controlled the policies and practices that governed the placement and removal of priests in the Archdiocese of Philadelphia.

[3] Cardinal Bevilacqua denied Respondent's first recommendation of placing Avery in an assignment at Our Lady of Ransom parish, a small parish with a strong and watchful pastor. [R. 915a- 918a.] The record repeatedly demonstrates that Cardinal Bevilacqua had the ultimate control of priest placements within the Archdiocese.

Bevilacqua assigned Avery as chaplain to Nazareth Hospital with residency at St. Jerome's parish, a large rectory where several other priests could observe Avery. [R. 921a, R. 1053a, R.1059a-1060a.]

Respondent helped put together an aftercare integration team, which included Fr. Graham, the pastor of St. Jerome's parish. [R. 927a, 929a, 933a-935a.] As evidence has indicated, Respondent described to Fr. Graham the details of Avery's past and the nature of Avery's treatment, asking Fr. Graham to be vigilant of Avery. [R. 933a-935a, R. 1118a-19a.] From the time of his discharge in 1993 until 1998, Avery remained in outpatient treatment with St. John Vianney therapists. [*See, e.g.*, R. 927a, 929a, 933a-935a, 936a, 943a, 948a, 950a, 965a.] Both Dr. Weychert and Dr. Helldorfer, Avery's therapists, regularly wrote to Respondent, assuring him that Avery was progressing well in therapy. [*Id.*][4] Avery attended weekly AA meetings for two years after his discharge from St. John Vianney. [R. 948a.] Avery also went on to pursue a Ph.D. in divinity, further indicating to Respondent that Avery was busying himself with activities that did not involve contact with children. [R. 963a-964a.] Avery even requested an assignment as chaplain at a veterans' hospital, which does not treat children. [R. 967a.]

Throughout the 1990s and until the early 2000s, when Avery was removed from ministry and laicized as the result of a new, more rigorous Archdiocesan policy, Respondent had no indication whatsoever that Avery had contact with children in his ministerial duties. In fact, Fr. Graham had complained that Avery was unwilling to help out at the parish and had fewer duties than other priests living at St. Jerome's rectory. [R. 939a; R. 1118a-19a.] He indicated that Avery was confining himself mostly to his chaplaincy duties and spending a lot of his free time with his

[4] The Commonwealth's Petition places a great deal of emphasis on the fact that Avery continued to act as a disc jockey following his discharge from St. John Vianney and during his chaplaincy at Nazareth Hospital. [*See, e.g.,* Petition, pp. 8-9, 32.] Yet the Petition fails to mention that the record demonstrated that Avery was a disc jockey at weddings and hospital events and did not use children to assist him. [*See, e.g.,* R.932a, 933a-935a, 945a-946a.] Furthermore, the Petition neglects to mention that Avery's therapists were aware of his disc jockeying activities and worked on this in therapy. [*See, e.g.*, R. 933a.] Significantly, the record is clear that Avery did not abuse D.G. while disc jockeying or through any activity that remotely involves disc jockeying.

elderly mother. [*Id.*] When the Archdiocesan policies changed in 2002, and the Office for Clergy started reconsidering all allegations against priests through a zero-tolerance prism, Respondent once again asked Avery to undergo a psychological assessment. [R. 983a, R. 1115a-30a.] The October 2003 Kelly Counseling and Consulting Report confirmed the Anodos Center/St. John Vianney diagnosis from ten years prior. [R. 1115a-30a.] The Kelly Counseling Report also diagnosed Avery with a history of alcohol abuse only, indicating that Avery did not present as an individual with a sexual disorder. [R. 1128a-30a.] Even the 2003 Kelly Counseling and Consulting Report did not advise that Avery be removed from ministry entirely. [*Id.*] Significantly, the Kelly Counseling and Consulting therapists interviewed Fr. Graham for the purposes of Avery's evaluation, learning that Fr. Graham had never observed Avery around young people. [R. 1118a-19a.]

Avery was removed from ministry in December, 2003 and subsequently laicized for his conduct with R.F. in the late 1970s. [R. 986a-987a, 988a-996a.] In January, 2009, D.G. contacted the Archdiocese of Philadelphia to accuse Avery of sexually abusing him during the 1998-1999 school year, while D.G. was 10 years old and a fifth-grade altar server at St. Jerome's school.[5] [R. 1000a.] Unlike R.F., D.G. recounted a story of random abuse, by a priest with whom neither he nor his parents had a relationship. [R. 3113a-29a (N.T. 4/25/12, pp. 96-158.)] At that time, Respondent had been gone from the Office of Secretary for Clergy for nearly five years. Respondent had never met, seen, or heard of D.G. until Respondent was charged with endangering him in 2011.

In sum, Respondent did not suspect, and had many valid reasons not to suspect, that Avery was anything but rehabilitated. He certainly never foresaw that the tragic events leading up to D.G.'s abuse would take place.

[5] D.G. also accused Father Charles Engelhardt of sexually abusing him and passing him on to Avery during the 1998-1999 school year. D.G. further accused St. Jerome's teacher Bernard Shero of sexually abusing him during the 1999-2000 school year.

B. PROCEDURAL HISTORY

This case began in 2002, when then-District Attorney Lynne Abraham empanelled a grand jury investigation into the manner in which the Archdiocese of Philadelphia treated allegations of sexual abuse against the priests it employed. The investigation, which was extended, concluded in 2005 with a 400-page report. While scathing, the report did not result in indictments against any members of the Archdiocesan hierarchy or priests, stating that the endangering the welfare of children ("EWOC") statute, 18 Pa. C.S.A. § 4304, in effect at that time did not cover individuals in the Archdiocese's administration who did not directly interact with Archdiocesan children.

Since the conclusion of the grand jury investigation, and following calls for reform that emanated therefrom, the legislature of Pennsylvania amended the EWOC statute, effective January 2007, to include individuals who did not directly interact with children but supervised others who did so. Respondent was charged with four distinct counts – two counts of violating 18 Pa. C.S.A. § 4304 (endangering the welfare of a child, "EWOC"), relating to his supervision of two discrete priests, Edward Avery ("Avery") and James Brennan ("Brennan"), as well as two counts of 18 Pa. C.S.A. § 903, conspiracy to commit EWOC with the aforementioned priests.

The case against Respondent proceeded to trial on March 26, 2012.[6] On June 22, 2012, after 13 days of deliberation, the jury convicted Appellant of one count of endangering the welfare of D.G. and/or other unnamed minors supervised by Avery. On July 24, 2012, Judge Sarmina sentenced Appellant to three to six years of imprisonment for a felony in the third degree for endangering the welfare of D.G.

[6] On March 22, 2012, Edward Avery pled guilty to one count of involuntary deviate sexual intercourse with D.G., as well as one count of a conspiracy with Respondent to endanger D.G. He received an agreed-upon sentence of 2 ½ to 5 years in prison. The Commonwealth rested its case on May 17, 2012, and counsel for Respondent moved for judgment of acquittal on all charges against Respondent. On that date, the trial court granted Respondent's Motion for Judgment of Acquittal with regard to the conspiracy to commit EWOC charge with James Brennan and denied judgment of acquittal on the remaining three counts.

A panel comprising Superior Court President Judge John T. Bender, Judge Christine L. Donohue, and Judge John L. Musmanno heard oral arguments in this case on September 17, 2013. On December 26, 2013, President Judge Bender issued the unanimous published opinion of the panel ("Opinion"), reversing Respondent's single EWOC conviction and ordering him discharged forthwith. Respondent had been incarcerated from the day of the jury verdict, June 22, 2012, until January 3, 2014, for the majority of that time at SCI Waymart. On January 3, 2014, Respondent has been released on house arrest. On January 27, 2014, the Commonwealth filed the present Petition for Allowance of Appeal ("Petition.")

IV. ARGUMENT

A. THE COMMONWEALTH DISTORTS THE ACTUAL HOLDING OF THE SUPERIOR COURT

From the outset, the Commonwealth has reformulated the Superior Court's holding in this case beyond recognition, suggesting that the Superior Court opined on matters that have never been presented for its consideration. The Commonwealth presents the question for appellate review to this Court in the following manner:

> 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 control of children? (Petition, p. 1.)

The Commonwealth goes on to assert that

> 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. (Petition, p. 14.)

This is a distortion of the holding at best and at its worst a complete fabrication that insults the intelligence and integrity of the Superior Court. The Superior Court's holding was

simply that the pre-amended EWOC statute, 18 Pa. C.S.A. § 4304, which formed the basis of Respondent's single conviction, did not apply to him as he was neither a parent, guardian, nor other person supervising the welfare of a child as previously defined in Superior Court's precedent. Moreover, the Superior Court held that the Commonwealth did not meet its burden in proving that Respondent was an accomplice to Avery's EWOC.

Contrary to what the Commonwealth would lead this Court to believe, Respondent was never charged with or convicted of reassigning pedophile priests. He was charged with four distinct counts - two EWOC counts and two conspiracy to commit EWOC counts – relating to his conduct with regard to only two specific priests – Avery and Brennan.[7] The Commonwealth never charged, nor could it have charged, Respondent with EWOC or conspiracy to commit EWOC with regard to any other priests.

In light of the brief procedural history, *supra*, it is clear that the only substantive matter that the Superior Court was asked to consider on appeal is whether Respondent was guilty of one count of EWOC vis-à-vis Avery, as either a principal or an accomplice to Avery. Consequently, that was the only matter that the Superior Court did, indeed, consider and adjudicate. Commonwealth's efforts to expand the scope of the trial and appeal in its Petition are but a dishonest attempt to deflect this Court's attention from the narrow issue actually before it by shrouding the narrow issue in a cloak of hysteria and emotions.

Commonwealth again misleads this Court by suggesting that Avery was a pedophile priest reassigned, "as part of a general scheme of concealment." In the lower court, the

[7] Throughout Respondent's trial, and after repeated and vigorous objections from Respondent, the trial court permitted the Commonwealth to introduce evidence of the files of 21 other priests who had served in the Archdiocese of Philadelphia and were accused, to varying degrees, of sexual misconduct with minors. It is not in dispute that Respondent was not involved, or barely involved, with many of the actions that the Archdiocese of Philadelphia undertook with regard to these priests. In fact, some of the conduct of the introduced priests dates back to the 1940, before Respondent was even alive. As the Commonwealth well knows, the trial court allowed the introduction of this evidence pursuant to Pa. R. Evid. 404(b), to assist the Commonwealth in meeting its burden of proof with regard to the four charges outlined above.

Commonwealth never established such a scheme, as is evidenced by the lower court dismissing one of two conspiracy charges and the jury acquitting Respondent of the other conspiracy count. Commonwealth cannot, in good faith, refer to such a general scheme now, when it is an unproven and irrelevant diversion from the question that had been posed before the Superior Court and is now before this Court.

Not satisfied with distorting the Court's holding, Commonwealth infused facts, unsupported by the record, and ultimately irrelevant to the Opinion, to wit, that Respondent "systematically reassigned pedophile priests. . . ." (*See, e.g.,* Petition, pp. 1, 14, 34.) Avery was never diagnosed as a pedophile. Nor was he diagnosed with any sexual disorder at all. Avery was diagnosed with alcoholism. The word "pedophile" is a clinical term, utilized by the pertinent Diagnostic and Statistical Manual of Mental Disorders (DSM) IV manuals. At no point during the trial did the Commonwealth produce an expert to opine on whether Avery is, in fact, a pedophile, and whether the diagnoses rendered by St. John Vianney and Kelly Counseling and Consulting were, in fact, incomplete or erroneous. The Commonwealth neither examined, nor attempted to discredit, any of the specialists at either of these institutions. As a result, nothing in the trial record suggests that the specialists who worked with Avery during Respondent's tenure as Secretary for Clergy were anything other than competent and duly accredited mental health professionals. In sum, the Commonwealth is not entitled to an inference that Avery is a pedophile, or can be described as such accurately. Once again, the Commonwealth's attempts to reinvent facts in an effort to retry the entire case in this Court after an unfavorable Superior Court Opinion are transparent and disingenuous.

B. THE COMMONWEALTH MISSSTATES AND MISAPPLIES DECISIONAL LAW

1. Misrepresentations with regard to the meaning of "supervising the welfare of a child"

Respondent was charged under the pre-2007 version of 18 Pa. C.S.A. § 4304, which states:

> 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.

As Respondent was neither a parent nor a guardian, he would have to be "[an]other person supervising the welfare of a child" to become liable under the statute. The Superior Court, in reviewing all relevant precedent, accurately determined that Respondent was not a supervisor within the meaning of the statute.

The sole basis for the Commonwealth's assertion that the pre-amended EWOC statute covers individuals like the Respondent rests on the Commonwealth's misguided reading of *Commonwealth v. Mack*, 359 A. 2d 770 (Pa. 1976).[8] Indeed the Commonwealth takes great umbrage with the Superior Court for finding this case to be only marginally relevant, despite the Commonwealth's efforts to style it as directly precedential. (*See, e.g.*, Petition, pp. 19, 21-23.) In *Mack*, the Supreme Court was presented with the issue of whether 18 Pa. C.S.A. § 4304 is unconstitutionally vague. Ruling that it was not, this Court recognized that the purpose of juvenile statues was to protect children from a broad range of conduct by adults, and that the "common sense of the community" may be considered in determining whether the particular conduct is rendered criminal. This Court stated, in relevant part:

[8] In fact, at oral argument and during questioning by the Honorable Christine Donohue, the Commonwealth failed to provide a single case that deals with the meaning of "a person supervising the welfare of a child" in the EWOC statute that provides support for the Commonwealth's position.

> the purpose of juvenile statutes, as the one at issue here, is basically protective in nature. Consequently, these statutes are designed to cover a broad range of conduct in order to safeguard the welfare of our children.... 'The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.'

359 A.2d at 772 (emphasis added.)

Indeed, this language makes sense, as it is impossible to codify all foreseeable ways in which a child could be endangered. A child can be starved, driven without a seatbelt, burned, raped, left without heat or shelter, kept dangling off a precipitous cliff, and subjected to an unimaginable number of unfathomable dangers. The obvious focus of this passage is on conduct, not on potential defendants. In fact, the *Mack* Court did not consider the statutory element of "supervising the welfare of a child" at all. Consequently, the Superior Court correctly deduced that *Mack* sheds no light on the meaning of "a person supervising the welfare of a child" - the only matter in question before the Superior Court and now this Court - and cannot serve as relevant precedent.

The Commonwealth launches into a vitriolic, condescending attack against the Superior Court for that Court's interpretation of *Commonwealth v. Halye*, 719 A.2d 763 (Pa. Super. 1998) (*en banc*, petition for allowance of appeal denied by this Court, 560 Pa. 699 (1999)), a case upon which the Superior Court relied in determining that Respondent was not a supervisor of D.G.[9] Without quoting the actual language of the *Halye* opinion, the Commonwealth baldly berates the Superior Court for insisting that, to be "a person supervising the welfare of a child," one must

[9] In *Halye*, the Superior Court reversed the EWOC conviction of an adult distant relative of a young victim, even though the convictions of involuntary deviate sexual intercourse, indecent assault, and corruption of minors remained. *Id.* at 764-65. The court determined that, despite the reprehensible behavior of the appellant, who was caught with his head near the exposed genitals of a little boy while visiting the little boy's family, the Commonwealth failed in its burden to prove that the appellant was a supervisor of the child to support an EWOC conviction.

engage in "actual/direct supervision of a child." (Opinion, *14-15.) According to the Commonwealth's tortured and self-serving logic, *Halye* does not mandate such a conclusion at all.

A look at what the *Halye* court actually held clarifies the matter:

> Despite the criminal nature of Appellant's actions, which support his convictions for involuntary deviate sexual intercourse, indecent assault and corruption of minors, there is insufficient evidence of Appellant's role as a supervisor or guardian of the child to support the endangering the welfare of children conviction. No testimony was presented to indicate that Appellant was asked to supervise the children or that such a role was expected of him. Rather, Appellant was a visitor in the child's home. The child's parents were home and were supervising their children. This is evidenced by the mother's remarks that her concern for the children led her to check on them and to discover the assault by Appellant.
>
> There is insufficient evidence to sustain a conviction for child endangerment where the Commonwealth fails to prove any statutory element. *Commonwealth v. Pahel*, 456 Pa.Super. 159, 689 A2d 963 (Pa.Super.1997). In this matter, viewing the evidence in the light most favorable to the Commonwealth, we conclude that it failed in its burden of proving that Appellant was in the position of supervising the children at the time of the assault. Accordingly we reverse Appellant's conviction for endangering the welfare of children.

719 A.2d at 764-65 (emphasis added.)

This language dispels any doubts that the *Halye* court determined that actual supervision of the child is essential to EWOC liability. It is significant to note that the opinion refers to supervising the children, a point which the Commonwealth neglects to mention. The Superior Court was correct, and bound by this case, to determine that Respondent, who never met or knew of D.G., could not be a person supervising his welfare within the meaning of the statute. The Commonwealth's assertion that "*Hayle* [sic], did not apply [the element of actual supervision],

did not find it, and did not even mention it" is, quite simply, baffling, when this is precisely the element that the *Halye* court found requisite for EWOC liability. (Petition, pp. 19-20.)

Though the Commonwealth chooses to ignore this fact in its groundless and desperate effort to denigrate a well-reasoned and soundly-supported Opinion, *Halye* is not the only precedential case that demands direct supervision for EWOC liability. In *Commonwealth v. Brown,* 721 A.2d 1105, n.6 (Pa. Super. 1998), the Superior Court stated that

> Proof that such adults were **actually supervising** a child requires evidence that the adult **was involved** with the child. By showing that the adult played with the child, bathed the child, ate with the child, babysat the child, or otherwise interacted with the child, the prosecution can prove that the adult was supervising the child during the time he resided with the child. This Court can foresee circumstances when an adult **is not involved** with the child, and thus would not be a person supervising the welfare of a child under the endangering statute. (Emphasis added.)

Similarly, in the recent *Commonwealth v. Bryant*, 57 A.3d 191 (Pa. Super. 2012), the Superior Court reaffirmed its prior conclusions in *Brown* and *Halye*. In this case, a man was convicted for, *inter alia*, EWOC for sexually assaulting his minor female relative. In upholding the EWOC conviction, the Superior Court emphasized that the abuser was a member of the victim's extended family, picked her up from school, became involved in her care and rearing, and spent time with her, sometimes as the only adult in the house. *Id.* at 198-99. The Superior Court determined that that appellant "was an extension of [his victim's guardian's] family who provided care for and/or control of [the victim]. *Id.* at 199.

When evaluating the significance of the phrase "a person supervising the welfare a child," it is useful to remember that this phrase does not stand in a vacuum, but is preceded by the words "parent or guardian." In its proper context, it is clear that this version of the statute was intended to cover those individuals who stand in the place of a parent. *See, e.g,*

Commonwealth v. Martir, 712 A.2d 327 (Pa. Super. 1998) (finding that it was not insignificant to note that EWOC is contained in Article D of the Crimes Code titled "Offenses Against the Family" as opposed to Article B entitled "Offenses Against the Person" which, for example, contains the crime of reckless endangerment of another person, a statute protecting a class of unknown persons) (Beck, J. concurring).)

There does not exist a more scathing rebuttal to the Commonwealth's dishonest position than the very fact that the statute in question was modified in 2007, to specifically include the language that the Commonwealth claims was always implicit in the pre-2007 version. This point, which was explained in great detail in Respondent's Appellate Brief and considered by the Superior Court[10], is merely summarized in the present Answer. The Commonwealth baldly suggests that "[t]he [pre-2007] statute does not suggest modifiers such as 'direct' or 'actual' in its use of the word 'supervising.'" (Petition, p. 16.) Nevertheless, upon the conclusion of the first Grand Jury empaneled to investigate sexual abuse in the Archdiocese of Philadelphia in 2005 - which determined that individuals like Respondent and other members of the Archdiocesan hierarchy could not be liable for EWOC[11]- the Philadelphia District Attorney's office joined in the effort to amend the statute to expand its scope.[12]

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[10] *See* Opinion, *10.

[11] The Grand Jury Report written by the Philadelphia District Attorney's Office in 2005 for that first grand jury states that:

> [D]efined under the law...the offense of endangering the welfare of children is too narrow to support a successful prosecution of the decision makers who are running the Archdiocese [like Respondent, the former Secretary for Clergy]. The statute confines its coverage to parents, guardians, and other persons "supervising the welfare of a child." ***High level Archdiocesan officials, however, were far removed from any direct contact with children.***

[R. 307a – 308a (Grand Jury I Report, pp. 65-66, attached as Exhibit 2 to Defendant William Lynn's Response to the Commonwealth's Motion to Admit Other Acts Evidence Pursuant to Pa. R. Evid. 404(b)(2) (emphasis added).)]

[12] On October 1, 2006, one of the lead prosecutors during the 2002-2005 Grand Jury that investigated sex abuse in the Archdiocese of Philadelphia authored an article for the newspaper, The Allentown Morning Call. In this article, the Commonwealth's representative states as follows:

The Pennsylvania legislature heeded the call and amended the statute in 2006, which now reads as follows:

> [a] parent, guardian or other person supervising the welfare of a child under 18 years of age, ***or a person that employs or supervises such a person***, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support. 18 Pa. C.S.A. § 4304(a) (emphasis added.)

What is more, the amended version of the statute identifies a supervisor of the welfare of a child as one who "provides care, education, training or control of a child" in the definition section. It is obvious that the clause "a person that employs or supervises such a person" creates a new class of individuals now liable for EWOC. It also is obvious that the definition of "supervising the welfare of a child" included in the new version of the statute is completely consistent with the requirement of actual and direct supervision of a child. The term "supervise the welfare of a child," it stands to note, has been present in both the pre-amendment and post-amendment versions of the statute, with the definition clarifying the meaning of the term as it always existed. In fact, if the Commonwealth's interpretation is correct, and the phrase "supervising the welfare of a child" never

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> It was also one year ago that the same grand jury [referencing Grand Jury I] revealed gaping loopholes in Pennsylvania laws intended to protect our children. ***The jurors found that church leaders have exploited these loopholes to shield predatory priests from prosecution and themselves from liability***...a year after the grand jury released its report [the Grand Jury I Report] it is reasonable to ask what has been done ***to reform*** the state laws that allow all the molestation and rape of children to go undetected, undeterred and unpunished. The grand jury recommended simple amendments to statutes that would ***close the loopholes***. Lawmakers have yet to pass any of these amendments. ... No statute deterred [church officials] from refusing ever to report the abuse of children to authorities, from transferring known predators to unsuspecting parishes, from allowing priests to continue to exploit their trusted position to procure new victims.... The legislators should not leave in place state laws that have allowed rampant child abuse to occur. They should promptly enact the Philadelphia grand jury recommendations to: ***make the law against endangering the welfare of children explicitly apply to supervisors who place children in the care of those known to be dangerous to children***....Although the grand jury exposed a particularly egregious case of an institution that exploited loopholes in the laws to avoid liability and shield the pedophiles in its employ, the proposed reforms would prevent child abuse more broadly....***What criminal law reforms cannot do is identify or hold accountable past abusers and enablers*** who have successfully concealed their offenses until after the statute of limitations has run.

[R. 303a -304a (The Allentown Morning Call, October 1, 2006.)]

necessitated direct supervision and encompassed all individuals who employ direct supervisors[13], then the definition of "supervising the welfare of a child" included in the post-amendment version of the statute would make no sense. Most supervisors of those who "supervise the welfare of a child," a role that Respondent purportedly held in the Archdiocese of Philadelphia, provide no "care, education, training or control" of a child. The trial record is clear, as the Superior Court recognizes, that Respondent provided no such "care, education, training or control" to any child in the Archdiocese of Philadelphia. (Opinion, *10.) It is precisely because the term of art "supervising the welfare of a child" is narrowly defined that the Pennsylvania legislature expanded EWOC liability to individuals who employ such supervisors. The Commonwealth's interpretation simply cannot coexist with the actual wording of the post-amendment statute.

Moreover, if the Commonwealth is correct, and the term "supervising the welfare of a child" has always subsumed employers of direct supervisors, then the Commonwealth is guilty of the very offense for which it baselessly excoriates the Superior Court – rendering statutory language superfluous. (Petition, pp. 17-19.) The phrase "employs or supervises such a person" would be redundant and meaningless, in violation of settled principles of statute construction, if it already is implicit in the clause "supervising the welfare of a child." *See, e.g, 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.A. 1921 (a) (directing courts to interpret a statute in a way that gives effect to all its provisions; 1 Pa. C.S.A. 1922(2) (requiring the presumption that the legislature intends "the entire statute to be effective and certain") (Petition, p. 18.).

[13] As the Commonwealth asserts, "'supervision' as ordinarily understood is routinely accomplished through subordinates.... 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." (Petition, p. 16.)

2. Misrepresentations of accomplice liability

As with its arguments in favor of finding Respondent guilty of EWOC as a principal, the Commonwealth's claim that Respondent "was *necessarily* guilty as an accomplice" to EWOC disintegrates upon the most basic examination of the relevant case law. (Petition, p. 26, emphasis in the original.) Predictably, the Commonwealth completely misstates the holding of the case it relies upon, and accuses the Superior Court of ignoring - *Commonwealth v. Roebuck*, 32 A.3d 613 (Pa. 2011). In that case, this Court determined that accomplice liability for third-degree murder, which, by definition, is an unintentional killing, is possible. The Commonwealth, quoting out of context, continuously zeroes in on the following language: "for offenses where a principal actor need not intend the result, it is also not necessary for the accomplice to do so." (*Id.* at 624, Petition, pp. 28, 31, 33.) The Commonwealth neglects to mention the requisite *mens rea* element for accomplices emphasized in *Roebuck*. The case notes: "the interconnection between accomplice *mens rea* and the mental state required of a principal actor represents an important restraint on accountability." *Id.* at 619, n. 11 (internal citation omitted.) The case holds that "[c]onsistent with the Model Penal Code, the Pennsylvania Crimes Code, and the weight of the authorities, the court thus held that a defendant may be held liable... under complicity theory 'if he has the requisite culpable mental state for the commission of the substantive offense, and he intentionally aids another in the crime.'" *Id.* at 624 (internal citation omitted.) Despite the Commonwealth's efforts to blur the significance of *mens rea* for accomplice liability, the very case law it cites demands that Respondent have the intent to facilitate or promote the commission of EWOC. *See also* 18 Pa. C.S.A. § 306(c).

As the Superior Court astutely notes in its Opinion, the Commonwealth failed to prove that Respondent had the requisite intent to facilitate the commission of EWOC. (Opinion, *18.) It bears remembering that EWOC is a specific intent offense. *Commonwealth v. Fewell,* 654 A.2d

1109, 1117 (Pa. Super. 1995). The statute defines the requisite *mens rea*, or intent, for EWOC as knowledge of endangerment: "[a] parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he **knowingly** endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa. C.S.A. §4304 (emphasis added.) Case law instructs us that one can only act "knowingly" "with respect to a material element of [the EWOC] offense when he is aware that it is practically certain that his conduct will cause such a result." *Commonwealth. v. Passarelli*, 789 A.2d 708, 716 (Pa.Super. 2001).

(i) Commonwealth's theory of Avery's EWOC liability

The first step in assessing how Respondent could have possibly served as an accomplice to Avery's commission of EWOC is making sense of the Commonwealth's convoluted and unsubstantiated theory of Avery's EWOC liability. Relying on *Commonwealth v. Lawton*, 414 A.2d 658 (Pa. Super. 1979), which does not deal with EWOC liability at all and is, therefore, completely inapplicable, the Commonwealth states: "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 that a specific victim be placed in danger." (Petition, pp. 27-28.) The Commonwealth's argument, which was refuted by the Superior Court, boils down to this: Avery's endangering behavior started the second he was in the vicinity of children, and EWOC occurred regardless of whether any sexual abuse, or even hint of sexual misconduct, took place. This overbroad argument subjects Avery and Respondent to criminal liability on the sole basis of Avery's status of having groped a teenager years earlier. This theory of liability equates Avery with a virus, whose mere presence exposes multitudes of unknown and unknowable children to grave harm. This conclusion is legally improper and is not supported by the record.[14]

[14] Indeed, in light of this expressed theory, it is surprising that the Commonwealth limited itself to only prosecuting Avery and Brennan. If the Commonwealth's theory is accurate, it could have easily prosecuted all the priests with files

To establish such liability, the Commonwealth would have had to provide sufficient evidence to establish several things. Firstly, it had to demonstrate that Avery was incurable, unable to control himself at all times, and that his behavior was constantly targeted toward seeking out another child to victimize. In effect, Avery was a walking, talking EWOC violation by virtue of being alive. Secondly, the Commonwealth had to show that Respondent knew that Avery was uncontrolled and incurable but nevertheless granted Avery unfettered access to children and did nothing to stop Avery. The Commonwealth proved none of it, as the Superior Court pointed out.

Respondent argued, and the Superior Court agreed, that speculative, generic, and most importantly, uncertain risk to unknown children cannot satisfy the Commonwealth's burden of proof. To the contrary, the trial record reveals the many affirmative steps Respondent took to foreclose the possibility of Avery abusing another minor. It was Respondent who got in touch with and interviewed R.F. about Avery's abusive acts. It was Respondent who confronted Avery and, despite the latter's denials, insisted on Avery's evaluation at the Anodos Center. It was Respondent who ensured that Avery underwent inpatient treatment for 8 months at St. John Vianney Hospital. It is clear from trial evidence that Avery did not receive a diagnosis of a sexual disorder. [R. 913a.] He was diagnosed with an alcohol disorder and a personality disorder, a diagnosis that was confirmed 10 years later by a different group of mental health professionals. [R. 1128a-30a.] Respondent stayed in constant touch with Avery's therapists, who informed Respondent that Avery was doing well. [*See, e.g.*, R. 933a, 936a, 943a, 948a, 950a, 965a.] In fact, Dr. Helldorfer, Avery's therapist, even advised Respondent that Avery should have active parish duties. [R. 950a.] The Commonwealth presented no evidence whatsoever from any medical professional to demonstrate that Avery was, indeed, an incurable time bomb, and certainly no evidence that Respondent knew

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in the Secret Archives for EWOC who remained in any sort of ministry, as well as Respondent and the entire Archdiocesan hierarchy as their accomplices. After all, these priests' EWOC liability continued by virtue of their very existence.

Avery was uncontrolled and uncontrollable. As the Superior Court acknowledges, Respondent had no reason to suspect that Avery presented the type of risk that could support a verdict that he aided Avery in Avery's EWOC. (Opinion, *19.)

The Commonwealth's argument amounts to an evisceration of the concept of "knowingly." Taken to its logical conclusion, Respondent would have been guilty as an accomplice to EWOC even if no child was abused – an untenable, perverse outcome. As the Superior Court notes, "[t]here was no underlying EWOC offense committed by Avery when Appellant facilitated his appointment to the St. Jerome's rectory..." (Opinion, *20.) That D.G. became a victim sheds no light on Respondent's knowledge and provides no credibility to the Commonwealth's uncontained theory of liability. At best, the Commonwealth conflated the "knowingly" requirement with a recklessness or negligence standard,[15] an impermissible expansion of the scope of the "knowingly" element and, consequently, accomplice liability. The Commonwealth clearly failed to provide sufficient evidence to demonstrate Respondent's knowledge that Avery was a danger of the sort implicated by the EWOC statute or Respondent's intent to facilitate the endangering of D.G. and/or other unnamed minors through sexual abuse.

(ii) Respondent was not an accomplice to the sexual abuse of D.G. and/or other unnamed minors supervised by Avery

The only possible theory of accomplice liability under which the Commonwealth could proceed is the theory that Respondent was an accomplice to the underlying offense at bar – Avery's sexual abuse of D.G. and/or other unnamed minors. After all, that is the only endangering that occurred in this case. The Superior Court acknowledges the fallacy of the Commonwealth's argument and properly concludes that the underlying EWOC offence in this

[15] *See* 18 Pa. C.S.A. § 302, which defines these standards.

case was the actual abuse of D.G. and/or other unnamed minors at St. Jerome's.[16] But the Commonwealth never charged, nor did it attempt to charge, Respondent as an accomplice to sexual abuse. As a result, this theory of accomplice liability should have been dismissed immediately.

Allowing the theory that Respondent was Avery's accomplice to the sexual abuse of minor(s) to survive this immediate hurdle, the Commonwealth did not, and could not, produce any evidence whatsoever to support this theory. It was the Commonwealth's burden to prove beyond a reasonable doubt that Respondent intended for the abuse of D.G. and/or other unnamed minors to take place at the hands of Edward Avery. The trial record is completely devoid of any evidence that would suggest, much less prove, that Respondent acted with the specific intent to harm any children in general and D.G. specifically, whom Respondent had never heard of until Respondent was charged with endangering D.G. The Commonwealth never once implied that Respondent had the requisite intent to harm children supervised by Avery during the entire course of the trial.

Trial evidence demonstrates that Respondent took steps that clearly bely his requisite intent to enable Avery to sexually abuse children. Furthermore, no other child, from St. Jerome's parish or otherwise, had come forward with allegations of abuse against Avery during Respondent's tenure as Secretary for Clergy. Therefore, Respondent had no reason to suspect that Avery remained a danger to minors. *Commonwealth v. Vining*, 744 A.2d 310, 323 (Pa. Super. 1999) clearly establishes that "[i]t is one matter to impose criminal [accomplice] liability when a parent or caretaker fails to alert authorities when there is knowledge of an ongoing and

[16] "When there was an underlying EWOC violation, Respondent's accomplice liability to EWOC was unsupported by sufficient evidence. Respondent did not know or know of D.G., he was not sufficiently aware of Avery's supervision of D.G. or any other child at St. Jerome's, nor did he have any specific information that Avery intended or was preparing to molest D.G. or any other child at St. Jerome's." (Opinion, *20.)

regular abuse of a child at the hands of another. It is quite another matter altogether to impose liability when an individual fails to prevent an unexpected and sudden assault on a child."

The decision in *Doe v. Liberatore*, 478 F.Supp. 2d 742 (M.D. Pa. 2007), is instructive. In that case, the federal court for the Middle District of Pennsylvania refused to find that a reasonable jury could conclude that the Diocesan Defendants of the Diocese of Scranton could be liable as accomplices to the sexual abuse of a minor committed by a priest of the Diocese. The court concluded that:

> While Plaintiff's (abused minor's) evidence demonstrates that the Diocesan Defendants had reason to suspect that Liberatore (priest) was sexually abusing Plaintiff, there is nothing in the record demonstrating that the Diocesan Defendants consciously shared Liberatore's knowledge of the underlying substantive offenses, as well as the specific criminal intent to commit them. Indeed, a general suspicion that an unlawful act may occur is not enough....[T]here still remains no evidence even remotely suggesting that the Diocesan Defendants shared Liberatore's specific intent to commit the sexual offenses. While the Diocesan Defendants may have avoided learning of Liberatore's offenses, there is no evidence that the Diocesan Defendants desired that his crimes be accomplished. *Id.* at 756-77 (internal quotations and citations omitted.)

It is significant to note that Respondent was acquitted of a conspiracy with Avery to commit EWOC. Like accomplice liability, the crime of conspiracy requires the demonstration of the specific intent to commit the underlying crime in question. The total outcome of the case begs the question of whether a jury could have found Respondent guilty beyond a reasonable doubt on the basis of accomplice liability if the trial court had properly dismissed the charges of direct EWOC liability.

C. THE COMMONWEALTH'S HYSTERICAL ACCOUNT OF THE PERILS INTRODUCED BY THE SUPERIOR COURT'S OPINION IS BASELESS

As has been its *modus operandi* throughout its Petition, in the absence of law and fact to support its position, the Commonwealth hopes to trick this Court into hearing its appeal on the basis of hysterics. Resorting to histrionics and claiming that "[i]t 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," the Commonwealth proceeds to outline a parade of horribles that would take place if the Superior Court's decision is permitted to stand. (Petition, p. 23.) To summarize the Commonwealth's position, "as long as this published Superior Court decision stands, the 2007 amendment cannot be relied on to protect children." (Petition, p. 25.) It is, frankly, astonishing, that the Commonwealth showed a modicum of restraint and did not take the small step to accuse a panel of thoughtful and distinguished jurists of facilitating EWOC themselves.

The Commonwealth is correct on one point: it accurately anticipated Respondent's position that allowance of appeal is unwarranted because the statute in question was subsequently amended to address his conduct. (Petition, p. 23.) Indeed, in light of the amendments to the new statute, which expand the class of individuals who can now be liable for EWOC, there is no need for this Court to delve into a case that will impact a decreasing, if not already non-existent, group of people. The new statute has been in effect for seven years now, and, undeniably, the statute of limitations on individuals who can only be prosecuted under the old version of the EWOC statute will be a barrier to most, if not all, prospective prosecutions. It stands to reason, then, that this Court should not waste its precious resources on cases with no application to potential future litigations.

The Commonwealth argues, however, that the Superior Court's interpretation of the pre-amended EWOC statute directly affects the current version of the statute. That argument is absurd. First and foremost, it is obvious that the Superior Court never considered the new version of the statute in arriving to its conclusion. It in no way expanded, or attempted to expand, its present holding to the post-amendment statute. It is presumptuous for the Commonwealth to, *sua sponte*, broaden the scope of a narrow holding beyond the Superior Court's intent.

Second, and as has been discussed *supra*, this Opinion, finding that direct and/or actual supervision is necessary for EWOC liability of "[an]other person supervising the welfare of a child" is not a new interpretation. It merely follows the precedent set in *Halye*, *Brown*, and *Bryant*, among other cases. If this Court chooses to dismantle this Opinion, it would have to destroy the entire body of case law that stands for the same proposition. It bears remembering that *Halye*, for example, was presented to this Court in a petition for allowance of appeal. This Court denied that petition.

Lastly, the assertion on page 24 of the Petition that "[it is] 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'" directly contradicts the wording of the new statute. As noted *supra*, the Commonwealth simply refuses to acknowledge that the new version of the statute included a definition of "supervising the welfare of a child." That definition mandates that a "person supervising the welfare of a child" must provide "care, education, training or control of a child." This language is synonymous and wholly consistent with actual and direct supervision of a child. You simply cannot provide care, education, training, or control of a child if you do not engage in direct and/or actual supervision of that child. In fact, if the new definition was inserted right into the main provision of the statute, it would read as follows: "person supervising the welfare of a child by providing care, education, training or control of the child, or a person that employs or supervises such a person."

It is obvious that the above definition of a person "supervising the welfare of a child" does not apply to or in any way modify the clause "employs or supervises such a person." That would

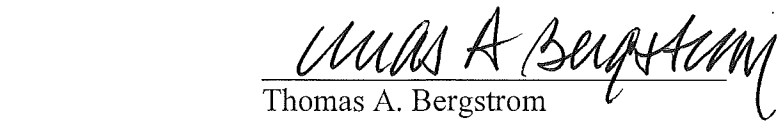
simply make no sense. So too, it is illogical and baseless to suggest that the need for direct or actual supervision of the child, the synonymous terminology used by the Superior Court, in any way pertains to the clause "a person that employs or supervises such a person."

It is evident that the presaged "danger" that the new version of the statute will not protect children has absolutely no grounding in the words of the Superior Court Opinion or the language of the new statute. It is nothing but an irrational appeal to emotion that should be ignored.

V. CONCLUSION

For all the foregoing reasons, the Commonwealth's Petition for Allowance of Appeal should be denied.

Respectfully submitted,



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Date: February 10, 2014

VERIFICATION

I, Thomas A. Bergstrom, hereby state that I am authorized to make this Verification on behalf of Respondent William Lynn. I verify that the statements made in the foregoing reply are true and correct to the best of my knowledge, information and belief.

I understand that the statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

Thomas A. Bergstrom

CERTIFICATE OF SERVICE

I, Thomas A. Bergstrom, hereby certify that on February 10, 2014, I caused to be served a true and correct copy of the foregoing Answer in Opposition to the Petition for Allowance of Appeal of Respondent William J. Lynn, with all attachments, by United States first class mail, postage prepaid, upon the following:

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