No. _____

In The
Supreme Court of the United States

GRAHAM B. SPANIER,

Petitioner,

v.

DIRECTOR OF DAUPHIN COUNTY PROBATION SERVICES; ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a state prosecute a defendant for violating a statute enacted after the defendant's conduct, without violating the Ex Post Facto Clause, merely because the statute does not indicate that it applies retroactively?

2. Does the Fourteenth Amendment's Due Process Clause preclude a state from obtaining a conviction on the basis of a jury instruction that uses the precise language of a criminal statute enacted after the defendant's conduct and that broadens the scope of criminal liability?

RELATED CASES

- *Commonwealth v. Spanier*, No. CP-22-CR-0003615-2013, Court of Common Pleas for Dauphin County, Pennsylvania. Judgment entered June 2, 2017.
- *Commonwealth v. Spanier*, No. 1093 MDA 2017, Superior Court of Pennsylvania. Judgment entered June 26, 2018.
- *Spanier v. Libby*, No. 3:19-cv-523, U.S. District Court for the Middle District of Pennsylvania. Judgment entered April 30, 2019.
- *Spanier v. Director Dauphin County Probation Services*, No. 19-2228, U.S. Court of Appeals for the Third Circuit. Judgment entered December 1, 2020.

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INTRODUCTION

1. Forty years ago, this Court rejected the notion that the Constitution's prohibition on ex post facto laws barred only those laws that, on their face, applied retroactively. *Weaver v. Graham*, 450 U.S. 24, 31 (1981). Because "it is the effect, not the form, of the law that determines whether it is ex post facto," *id.*, the prohibition is implicated whenever a criminal statute is applied to a defendant's conduct occurring before the statute's enactment, as it was in *Weaver*, *id.* at 27 & n.4, and in this case. Yet the Third Circuit reversed the district court's grant of the habeas writ in this case, finding that "there was no ex post facto violation" because "the Pennsylvania General Assembly did not provide that the [statute petitioner allegedly violated] would apply retroactively." Pet.App.17a. This holding is contrary to both this Court's decision in *Weaver* and numerous other decisions applying that precedent.

As *Weaver* made clear, the Constitution's prohibition on ex post facto laws is implicated whenever a criminal statute is applied to conduct pre-dating its enactment, whether the retroactive application arises from the legislature's express command or a prosecutor's charging decision. Indeed, excluding the latter situations from the Ex Post Facto Clause's scope would significantly weaken the protections of this core "constitutional bulwark in favor of personal security and private rights." THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed. 1961). Under the Third Circuit's holding, the Ex Post Facto Clause provides no protection to a defendant unless a legislature openly

flouts the Constitution's limitations and expressly provides that a new criminal law applies to prior conduct.

Graham Spanier was charged with violating a statute that went into effect in 2007 – and that broadened the definition of criminal conduct – solely on the basis of his conduct in 2001. This Court should grant the writ to establish that courts that – unlike the Third Circuit – have continued to apply *Weaver* have properly done so because the Ex Post Facto Clause is implicated whenever a new criminal statute is applied to conduct pre-dating its enactment.

2. Because Spanier was charged with violating a statute that went into effect in 2007, the court at his trial instructed the jury – over Spanier's repeated objections – using the language of that 2007 statute and not the language of the statute in effect in 2001. Thus, Spanier was convicted on the basis of a 2007 statute for his conduct in 2001. This is contrary to this Court's longstanding precedents under which "fundamental due process prohibits the punishment of conduct that cannot fairly be said to have been criminal at the time the conduct occurred." *Rogers v. Tennessee*, 532 U.S. 451, 466 (2001). Yet the Third Circuit reversed the district court's grant of the habeas writ on this ground as well.

Since at least this Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), it has been clear that the Due Process Clause precludes "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352; *see also Metrish v.*

Lancaster, 569 U.S. 351 (2013). When a court bases its jury instructions on the broader language of a statute enacted after a defendant's conduct, this is a paradigmatic unforeseeable and retroactive expansion of the precise language of the statute in effect at the time of that conduct. Many lower courts have reached this conclusion in applying the Court's *Bouie* line of cases, in conflict with the Third Circuit's holding here. This Court should grant the writ on this issue to clarify that *Bouie*'s prohibition on judicial expansion of criminal statutes applies when a court relies on a broader statute, enacted after the defendant's conduct, to instruct a jury on the elements of a crime.

OPINIONS BELOW

The district court's opinion granting the writ of habeas corpus (Pet.App.42a-96a) is reported at 2019 U.S. Dist. LEXIS 72824 and 2019 WL 1930155. The Third Circuit's decision reversing the district court (Pet.App.1a-39a) is reported at 981 F.3d 213. The state trial court's post-trial decision (Pet.App.155a-88a) is not reported. The Superior Court of Pennsylvania's 2-1 decision affirming Spanier's conviction (Pet.App.100a-54a) is reported at 192 A.3d 141.

JURISDICTION

The Third Circuit issued its opinion and entered judgment on December 1, 2020, and denied a timely

motion for rehearing on January 4, 2021. Pet.App.40a-41a, 190a-91a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, Clause 1 of the United States Constitution provides, in relevant part, "No state shall . . . pass any . . . ex post facto law."

The Fourteenth Amendment to the Constitution provides, in relevant part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

The statute at issue in this case is Section 4304 of the Pennsylvania Crimes Code, entitled "Endangering welfare of children." The relevant portion of the statute in effect *in 2001* provided:

> 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. § 4304(a) (1995). The relevant portion of the statute that went into effect in *January 2007* provided:

> 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. § 4304(a)(1) (2007).

STATEMENT OF THE CASE

Few of the underlying facts that formed the basis for the criminal charges against Graham Spanier are material to consideration of the questions presented in this petition. Most pertinent, as the Third Circuit noted, "Spanier was convicted solely for his actions in 2001." Pet.App.37a. Yet, over Spanier's repeated objections, he was charged and tried with violating a statute that went into effect six years later, in 2007. Moreover, despite his additional objections, the court instructed the jury at his trial on the basis of that broader 2007 statute, rather than the statute in effect in 2001. The state courts summarily rejected Spanier's constitutional challenges to this course of events, but the district court granted Spanier's habeas petition on both ex post facto and due process grounds. The Third Circuit reversed, in a holding that conflicts with this Court's longstanding precedents and other courts' application of those precedents in similar circumstances.

A. The charges against Graham Spanier.

The Commonwealth of Pennsylvania filed criminal charges against Graham Spanier in November 2012. *See* 3d Cir. App. 46-49 ("App."). The charges arose from his allegedly inadequate response to a report of an incident involving a former Pennsylvania State University employee (Gerald Sandusky) and a minor child on the university's campus in 2001 when Spanier was the university's president. Pet.App.4a-7a. The charges included two counts of child endangerment under Section 4304(a)(1) and (a)(2) of the Pennsylvania Crimes Code, provisions that became effective in 2007. App.47. Spanier eventually was convicted of a single count of child endangerment, under Section 4304(a)(1). App.1397.

Throughout the pre-trial proceedings, Spanier objected to being charged with violating a 2007 statute for his conduct in 2001. App.173-74, 176-77, 459, 461-62. In response to these objections, the prosecution did not dispute that it was charging Spanier with violating the 2007 statute; rather, it contended that Spanier engaged in a course of conduct from 2001 to 2012, and therefore, according to the prosecution, he could be charged with violating the 2007 statute. App.502-03. At his trial, however, the jury found that Spanier had *not* engaged in a course of conduct, Pet.App.14a, and thus, he "was convicted solely for his actions in 2001," Pet.App.37a.

B. The Pennsylvania child-endangerment statute.

The 2007 statute that Spanier was charged with and convicted of violating required the prosecution to prove a number of elements beyond a reasonable doubt, including the one that led to this habeas petition. To find that element proven, the jury had to conclude that Spanier fell within one of *four* categories of persons – "[1] parent, [2] guardian or [3] other person supervising the welfare of a child under 18 years of age, *or* [4] *a person that employs or supervises such a person*." 18 PA. C.S. § 4304(a)(1) (2007) (emphasis added). By contrast, under the child-endangerment statute in effect in 2001 when all of Spanier's relevant conduct occurred, the jury had to find that Spanier fell within one of *three* categories of persons – "[1] parent, [2] guardian, or [3] other person supervising the welfare of a child under 18 years of age." 18 PA. C.S. § 4304(a) (1995).

Thus, the 2007 statute added a fourth category of persons subject to criminal liability for violating a duty to children, and that fourth category was sufficient in and of itself to meet this element of the crime. Under the 2007 statute, even if the prosecution did not prove beyond a reasonable doubt that a defendant himself was a parent, a guardian, or someone supervising the welfare of a child, *which the pre-2007 statute required*,[1]

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[1] *See Commonwealth v. Lynn*, 114 A.3d 796, 823 (Pa. 2015) (holding that, under the pre-2007 statute, where the defendant was not a parent or guardian, "the Commonwealth had to prove

it could still obtain a conviction by proving that the defendant *employed or supervised someone else* who in turn supervised the welfare of a child.

C. The jury instructions and verdict.

At trial, Spanier submitted proposed jury instructions based on the statute in effect in 2001 and objected to the prosecution's proposed instructions, which used the language of the broader 2007 statute. App.679-80, 691-92 & n.1, 632. At a charge conference after the close of evidence, the court indicated that it would use the prosecution's proposed jury instructions, including the precise language of the 2007 statute. App.1201, 1213. Spanier renewed his objection to use of the language from the 2007 statute. App.1215.

After reading this language to the jury as part of its final instructions, App.1306-07, the court provided the jury with a written copy of the elements of the charges using the language of the 2007 statute. App.1201, 1306, 1323. During deliberations, the jury asked the court about the meaning of the word "supervision" in the child-endangerment element at issue here, App.1344-45, and the court then read to the jury the definition of this element again, using the language of the 2007 statute, App.1351.

The jury found Spanier guilty of the child-endangerment charge under Section 4304(a)(1), but found

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that he fell within 'other person supervising the welfare of a child' ").

that he had not engaged in a course of conduct. App.1397. Because the jury rejected the Commonwealth's course-of-conduct theory for charging Spanier with violating the 2007 statute, "Spanier was convicted solely for his actions in 2001." Pet.App.36a-37a. The jury found Spanier not guilty of the remaining charges. App.1397.

D. The state-court rulings.

In a post-trial motion and on appeal, Spanier continued to challenge application of the 2007 child-endangerment statute to his conduct in 2001. App.1505-06, 1626-29, 1634-35. The state trial court rejected Spanier's argument, holding that the statute in effect in 2001 was as broad as the 2007 statute, Pet.App.177a, 185a, despite the later statute's addition of a new category of persons subject to criminal liability – those who did not supervise a child's welfare but employed or supervised someone else who did. *See* 18 PA. C.S. § 4304(a)(1) (2007); *see also supra* note 1. In affirming Spanier's conviction, the Superior Court of Pennsylvania did not address his ex post facto argument. The closest the court came to addressing the issues raised in this petition was its conclusion that, on "the facts of this case, the trial court's instruction on the 2007 version of the [child-endangerment] statute did not result in an inaccurate statement of the law." Pet.App.129a.

E. The decisions below.

Following the conclusion of the state-court proceedings, Spanier filed this timely habeas petition pursuant to 28 U.S.C. § 2254(a). App.1830. As a threshold matter, the district court rejected the Commonwealth's argument that Spanier was not charged with violating the 2007 statute, an argument the Commonwealth made for the first time in federal court: "It is evident that the Commonwealth charged Spanier under the 2007 statute. . . . [T]he 2007 statute was . . . retroactively applied to Spanier during his criminal proceedings and conviction." Pet.App.44a n.3.[2]

The district court held that "application of [the 2007] statute to Spanier's conduct is an unconstitutional retroactive application of the law." Pet.App.81a-82a. The court also found that, because "the jury was instructed on the basis of the broader 2007 statute, instead of the 1995 statute in effect during 2001, . . . there is a reasonable likelihood that the jury convicted Spanier based on conduct that was not criminal under the 1995 statute." Pet.App.86a-88a. The court granted Spanier the writ of habeas corpus, finding that he had met his burden under 28 U.S.C. § 2254(d) for his ex post facto and due process claims arising from application of the 2007 statute to his conduct in 2001. Pet.App.95a-96a.

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[2] The state trial court reaffirmed numerous times that the 2007 statute had been applied to Spanier. Pet.App.169a-70a, 173a, 178a, 183a-85a.

The Commonwealth appealed and the Third Circuit reversed. Pet.App.1a-39a. The Third Circuit held that no relief was warranted on Spanier's ex post facto claim because "the Pennsylvania General Assembly did not provide that the 2007 version of the statute would apply retroactively." Pet.App.17a. The court also reversed the district court's grant of the writ on Spanier's due process claim. The Third Circuit held that, given the standard in 28 U.S.C. § 2254(d)(1), it could not conclude that the state courts' determination that there was no difference between the 2001 and 2007 statutes constituted an "unexpected and indefensible" interpretation of the 2001 statute. Pet.App.29a, 31a-32a (citing *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).[3]

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's holding that the Ex Post Facto Clause is not implicated unless a legislature expressly provides that a statute applies retroactively is in conflict with this Court's precedents and other lower court decisions.

This Court has made clear that the Ex Post Facto Clause is implicated whenever a criminal statute is applied to conduct pre-dating the law's enactment,

[3] The Third Circuit rejected the Commonwealth's arguments that Spanier had not properly exhausted his habeas claims. Pet.App.19a-20a.

whether the retroactive application arises from a legislature's express command or from a prosecutor's charging decision. Most directly, in *Weaver v. Graham*, the Court expressly rejected the state's argument that a law was "not retrospective because, on its face, it applies only after its effective date." 450 U.S. 24, 31 (1981). Yet the Third Circuit in this case relied on this precise ground to deny habeas relief, holding that "there was no ex post facto violation" because "the Pennsylvania General Assembly did not provide that the 2007 version of the statute would apply retroactively." Pet.App.17a.

The statute in *Weaver*, like the 2007 statute here, did not indicate whether it applied retroactively, but the state had applied it retroactively to the petitioner in that case. 450 U.S. at 27 & n.4. This Court explained that "it is the *effect*, not the form, of the law that determines whether it is ex post facto." *Id.* at 31 (emphasis added). Thus, in "the context of [a particular] case," a statute implicates the Ex Post Facto Clause when it is applied to a defendant's pre-enactment conduct, even if the legislature does not require such an application. *Id.*; *see also id.* at 36 (holding that the statute was "void *as applied to petitioner*, whose crime occurred before its effective date" (emphasis added)).

Since *Weaver*, this Court frequently has reaffirmed its holding, whether directly or by implication, in determining whether a statute's application violated the Ex Post Facto Clause, even though the statute itself did not provide that it should apply retroactively. In *Lynce v. Mathis*, this Court held that

the Ex Post Facto Clause was implicated after a state attorney general issued an opinion interpreting a new law as applying retroactively and, as a result, the petitioner was rearrested and returned to custody. 519 U.S. 433, 435-36 (1997). In *Carmell v. Texas*, the Court noted that the state had applied a new law to the defendant, thereby implicating the Ex Post Facto Clause, without any indication that the law itself provided that it should be applied retroactively. 529 U.S. 513, 518-20 (2000). And in *Miller v. Florida*, the Court unanimously held that a new state sentencing regime violated the Ex Post Facto Clause when it was applied to a defendant whose crime pre-dated the new regime. 482 U.S. 423, 430-31 (1987).

In each of these cases, and others like them, the statute itself was silent on whether it had retroactive or exclusively prospective effect, but the state applied it retroactively to the defendant, thereby implicating the Ex Post Facto Clause. Lower courts have applied *Weaver*'s holding in similar circumstances, finding that a law silent on its temporal scope nonetheless implicates the Constitution's ex post facto restrictions when the law is applied retroactively, contrary to the Third Circuit's holding in this case.

For example, in *Raske v. Martinez*, a prisoner challenged the application of a new Florida gain-time statute to his conviction that pre-dated enactment of the new statute. 876 F.2d 1496, 1497 (11th Cir. 1989). The statute did not indicate whether it should be applied retroactively, but the state agency responsible for administering the new statute "applied the method of

calculating gain time adopted in the [new] act to all inmates – including those convicted of offenses that occurred before the act's passage." *Id.* at 1498. The statute therefore implicated the Ex Post Facto Clause and the challenged provisions of the new act "constitute[d] an unconstitutional ex post facto law as applied to petitioner." *Id.* at 1502.

That is precisely the situation here. Regardless what the statute itself said, the Commonwealth of Pennsylvania charged Spanier with violating the 2007 statute and prosecuted him for violating that statute. Because "Spanier was convicted solely for his actions in 2001," Pet.App.37a, his conviction constituted the "retroactive application of penal legislation," which the "Ex Post Facto Clause flatly prohibits." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). As this Court has made clear for at least the past four decades and as circuit courts other than the Third Circuit have understood, this is so even when the retroactive application is the result of prosecutorial decisions and not a legislature's express command. The Court should grant the petition to reaffirm this core principle of the Ex Post Facto Clause.[4]

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[4] Because the Third Circuit held that the lack of a retroactivity provision in the 2007 statute foreclosed Spanier's ex post facto claim, it did not address whether the 2007 statute "alters the definition of criminal conduct" in the child-endangerment statute. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995). It plainly does. The 2007 statute added a fourth category of individuals – those who are *not* parents, guardians, or supervising a child's welfare, but *are* employing or supervising someone else who is – to the prior statute's three categories, thereby expanding

II. The Third Circuit's holding that the Due Process Clause is not violated by a jury instruction that permits a jury to find a defendant guilty on the basis of a criminal statute enacted after the defendant's conduct is in conflict with this Court's precedents and other lower court decisions.

At Spanier's trial, the court instructed the jury that it could convict him of child endangerment if the Commonwealth proved the elements of *the 2007 statute*, which relieved the Commonwealth of its burden of proving that Spanier supervised the welfare of a child, as *the pre-2007 statute* required. App.1306-07. The Third Circuit's holding that this retroactive application of the broader statute did not violate the Due Process Clause is contrary to this Court's precedents and conflicts with numerous lower court decisions in virtually identical circumstances.

1. In the seminal decision of *Bouie v. City of Columbia*, this Court applied the Constitution's ex post facto principles to judicial interpretation of a statute, finding that the Due Process Clause prohibited judicial modifications to criminal statutes that were "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." 378 U.S. 347, 354 (1964) (internal quotation and citation omitted). In *Bouie*, as in this case, the challenged interpretation of an existing statute did not arise in a

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the scope of individuals subject to the law and altering its definition of criminal conduct.

vacuum, but was based on a new statute enacted after the defendants' relevant conduct.

In *Bouie*, the statute in existence at the time of the defendants' conduct prohibited entering someone else's property "after notice" that such entry was prohibited. *Id.* at 349. Despite the "precise" language of the statute requiring such pre-entry notice, *id.* at 352, the defendants were convicted on the basis of the state supreme court's interpretation of the statute as also prohibiting "remaining on the premises of another after receiving notice to leave," *id.* at 350 – a prohibition that the legislature added to the state criminal code shortly *after* the defendants' conduct, *id.* at 361. This Court held that the new interpretation was "so clearly at variance with the statutory language" in effect at the time of the defendants' conduct and had "not the slightest support in prior [state] decisions." *Id.* at 356. Thus, the state had punished defendants "for conduct that was not criminal at the time they committed it," and therefore "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350.

This Court has applied the due process principles from *Bouie* numerous times in the intervening years, reaffirming that the "unforeseeable judicial enlargement of a criminal statute," *id.* at 353, contravenes the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct," *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001);

see also Metrish v. Lancaster, 569 U.S. 351, 365-66 (2013) (noting that, in *Bouie*, the state court "had unexpectedly expanded 'narrow and precise statutory language' that, as written, did not reach the petitioners' conduct"); *Splawn v. California*, 431 U.S. 595, 599-601 (1977) (noting, in the context of a challenge to jury instructions, that *Bouie* held "that the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited").

2. Numerous circuit courts and state courts have applied *Bouie* and its progeny in the circumstances of this case – where courts instructed juries using the language of a broader statute enacted after the defendant's relevant conduct – and held that the defendant's due process rights were violated.

For example, in *Murtishaw v. Woodford*, a jury instruction during the penalty phase of a capital trial used the "bare language" of a statute enacted after the defendant's conduct, without applying a narrowing construction later given to the statute by the state supreme court. 255 F.3d 926, 961 (9th Cir. 2001). Because "the trial court applied the [later] statute and . . . quoted the exact language of the [later] statute in instructions to the jury," *id.* at 964, the improper instruction violated the defendant's due process rights, *id.* at 965-74.[5] Similarly here, the jury at Spanier's trial was

[5] The Ninth Circuit held that the use of the later statute to instruct the jury violated both the prohibition on ex post facto laws, 255 F.3d at 965-67, and the Constitution's due process protections, *id.* at 969-71.

instructed using the precise language of the 2007 statute. As in *Murtishaw*, the jury was given no limiting instruction that might have mitigated the effect of using the broader language of the 2007 statute.

In addition to the Ninth Circuit, the Tenth and Eighth Circuits have held, in conflict with the Third Circuit, that an instruction based on a statute enacted after the defendant's conduct violates due process. In *Selsor v. Workman*, the jury was instructed on the basis of a statute enacted after the defendant's conduct and that "required fewer elements of proof" than the prior statute. 644 F.3d 984, 1013 (10th Cir. 2011). Thus, "the state trial court's instructional error clearly had an ex post facto effect on [the defendant]," thereby violating his due process rights. *Id.* The court held that, in reaching a contrary conclusion, the state court "unreasonably determined that no constitutional error resulted from the state trial court's first degree murder instructions." *Id.*[6] And in *Jones v. Arkansas*, the Eighth Circuit

[6] The court ultimately denied habeas relief, finding that the constitutional error was harmless because the element missing from the jury charge was "essentially undisputed." 644 F.3d at 1014. By contrast here, there can be no doubt that the court's reliance on the broader 2007 statute to instruct the jury prejudiced Spanier, as it allowed the jury to find him guilty even if it concluded that he did not supervise the welfare of a child but that he supervised someone else who did. The jury heard undisputed evidence that Spanier supervised two other university administrators who had pled guilty to child endangerment and who, unlike Spanier, directly addressed the 2001 incident by meeting with all of the involved parties. Indeed, in its post-trial opinion, the state trial court expressly found that Spanier was "a person who employed or supervised persons who supervised the welfare of children," Pet.App.177a, precisely the category added by the 2007

held that a habeas petitioner was entitled to the writ where the trial court had instructed the jury on the basis of a statute enacted after his conduct and that had reduced the number of prior felonies required for application of a habitual offender law. 929 F.2d 375, 377 (8th Cir. 1991) (holding that petitioner "was denied due process because he was sentenced under a statute that was not in effect at the time he committed his crime").

3. A number of state courts have reached the same result, again departing from the Third Circuit's holding in this case. In *Miller v. Commonwealth*, the Supreme Court of Kentucky held that a statute enacted after some of a defendant's allegedly criminal conduct had "been applied in an ex post facto manner." 391 S.W.3d 857, 863 (Ky. 2013). The jury in *Miller* was instructed using the new statute, which increased the grading and penalty for the charged offense, even though some of the alleged conduct occurred prior to enactment of the new statute. *Id.* The court held that the defendant's due process rights were violated because he could not be convicted or punished for conduct pre-dating the statute applied to him. *Id.* at 864-65.

Notably, the *Miller* court, relying on this Court's decision in *United States v. Marcus*, 560 U.S. 258 (2010), held that the outcome might be different if the statute at issue criminalized a "course of conduct" and some of the defendant's conduct occurred

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statute and improperly included in the jury instruction on the child-endangerment charge.

after enactment of the new statute. *Miller*, 391 S.W.3d at 865-66. But the statute in *Miller* did *not* criminalize a course of conduct, just as the statute at issue here effectively did not, after the jury found that Spanier had not engaged in a course of conduct. Pet.App.36a-37a. *See also State v. Norush*, 642 P.2d 1119, 1121 (N.M. Ct. App. 1982) (vacating defendants' convictions because jury instructions, which eliminated a potential defense, were based on a change in law occurring after their conduct).

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The Third Circuit's decision in this case, which permits the imposition of criminal liability "for conduct committed at a time when it was not fairly stated to be criminal," *Bouie*, 378 U.S. at 362, conflicts with the decisions of other circuit courts and state courts on the precise same issue – whether due process precludes a conviction on the basis of a jury instruction using the broader language of a criminal statute enacted after the defendant's conduct. The Court should grant the petition to address this important due process issue.

CONCLUSION

The Court should grant the petition.

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