

No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

JOAN ORIE MELVIN,
Petitioner,

v.

STEPHEN D. ZAPPALA, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, AND
FRANK J. SCHERER, DIRECTOR, ALLEGHENY COUNTY PROBATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether a defendant's rights under the Fifth Amendment as incorporated by the Fourteenth Amendment are violated when she is charged and convicted of state crimes based on alleged deviation from a standard contained in an internal workplace rule rather than the charged offenses.

PARTIES TO THE PROCEEDINGS

The petitioner herein, who was the petitioner-appellant below, is Joan Orie Melvin.

The respondents herein, who were the respondents-appellees below, are Stephen D. Zappala, District Attorney of Allegheny County, and Frank J. Scherer, Director of Allegheny County Probation.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joan Orie Melvin, hereby petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

Orie Melvin was convicted and sentenced in the Court of Common Pleas of Allegheny County, Pennsylvania. The judgment of the trial court is reproduced in the appendix to this petition, Petition Appendix (“Pet. App.”) 88-91. The Pennsylvania Superior Court denied Orie Melvin’s direct appeal. Pet. App. 30-78. Orie Melvin then filed a petition for writ of *habeas corpus* in the U.S. District Court for the Western District of Pennsylvania. By Order dated April 20, 2017, the district court denied the *habeas corpus* petition and declined to issue a certificate of appealability. Pet. App. 06. The U.S. Court of Appeals for the Third Circuit issued a certificate of appealability but affirmed the denial of the *habeas corpus* petition. Pet. App. 02-05. Orie Melvin’s petition for rehearing *en banc* was denied on February 21, 2020. Pet. App. 01.

JURISDICTION

The order sought to be reviewed was entered by the court of appeals on February 21, 2020. Pet. App. 01. Pursuant to Supreme Court Rule 13 and this Court’s Order of April 15, 2020, the deadline to file a petition for a writ of certiorari is July 20, 2020. This Court has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, as follows:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const., amend. V.

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part, as follows:

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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV.

Title 28 of the United States Code, Section 2254 provides, in pertinent part, as follows:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254.

STATEMENT OF THE CASE

Due process requires that criminal statutes must give fair warning of conduct that is punishable as a crime. In this case, Orie Melvin was charged, convicted and sentenced for alleged violation of a workplace rule not referenced in any of the charged offenses. The Third Circuit opinion denying *habeas corpus* relief sanctions prosecution of an employee who deviates from a standard imposed by his or her employer rather than the legislature. Intervention by this Court is necessary to correct this error of law and enforce the due process guarantee in the Fifth and Fourteenth Amendments to the Constitution.

A. Orie Melvin’s Election to the Pennsylvania Supreme Court and Indictment in Allegheny County.

In 2009, while serving as a judge on the Pennsylvania Superior Court, Orie Melvin campaigned for and won a seat on the Pennsylvania Supreme Court. (See, e.g., T 13-978 at 2885-86.)¹ Less than a week before the 2009 election, Allegheny County District Attorney Stephen D. Zappala commenced an investigation into alleged political activity by then-State Senator Jane Orie’s legislative staff in support of Orie Melvin’s campaign for Supreme Court. Jane Orie is Orie Melvin’s sister. This investigation later culminated with a seven-count Information charging Orie Melvin with theft of services in violation of 18 Pa. C.S.A. § 3926(b), conspiracy to commit theft of services in violation of 18 Pa. C.S.A. § 903(a)(1), misapplication of entrusted property in violation of 18 Pa. C.S.A. § 4113, official oppression in violation of 18 Pa.

¹ References to “T ___” are to the official transcripts filed to the docket.

C.S.A. § 5301 and conspiracy to tamper with evidence in violation of 18 Pa. C.S.A. § 903(a)(1). (JA 88-92.)²

The theft of services charges were premised on the District Attorney's theory that Orie Melvin, either personally or through accomplices or through a conspiracy used Superior Court judicial staff and Jane Orie's Senate Staff to promote Orie Melvin's campaigns for the Supreme Court. The misapplication of government property charge similarly alleged that Orie Melvin personally and through an accomplice used Superior Court equipment and supplies to support the campaigns. The official oppression charge alleged that Orie Melvin required a judicial staffer "to perform political and campaign-related acts . . . that were prohibited by Pennsylvania Supreme Court Order of Court and procedures for all Court personnel. . ." (JA 91.)

All of the charges against Orie Melvin were based on the Guidelines Regarding Political Activity by Court-Appointed Employees adopted by the Pennsylvania Supreme Court ("the Guidelines"). (JA 267-70.) The Guidelines apply to court employees both on and off-the-clock and direct generally that "Court-appointed employees shall not be involved in any form of partisan political activity." (Guidelines ¶ 2(a).) "Partisan political activity" is specifically defined for purposes of the Guidelines as "running for public office, serving as a party committee-person, working at a polling place on Election Day, performing volunteer work in a political campaign, soliciting contributions for political campaigns, and soliciting contributions for a political action committee or organization." (*Id.* ¶ 1(a).) The District Attorney

² References to "JA ____" are to the Joint Appendix filed in the Third Circuit.

theorized that, because political activity is prohibited by the Guidelines, any campaign-related tasks allegedly performed by members of Orie Melvin's judicial staff must constitute criminal diversion of services and criminal misapplication of judicial resources.

B. The Trial.

Orie Melvin moved for dismissal of the charges on the grounds that, *inter alia*, it is a violation of due process to base criminal charges on a non-criminal work rule and later moved *in limine* to preclude any reference to the Guidelines at trial. Both motions were denied and the case was tried before a jury in Allegheny County.

Throughout the trial, the District Attorney relied on the ban on political activity in the Guidelines to suggest a diversion of judicial services and misapplication of judicial equipment. The District Attorney questioned witnesses about the Guidelines, (T 13-868 at 1085-86, 1190-92; T 13-932 at 1405-08, 1515-18, 1561-63, 1626-28; T 13-1014 at 2466), offered court personnel records relating to the Guidelines as trial exhibits which were admitted by the trial court, (JA 271-300), and argued to the jury in closing arguments that the Guidelines served as "scienter" and "notice" to Orie Melvin and her staff that they risked criminal punishment if they participated in political activities, (JA 154-55, 158-59, 168).

In her defense, Orie Melvin established, *inter alia*, that no judicial services were diverted and that no judicial equipment was damaged.³ The evidence was

³ Orie Melvin also defended against the charges by demonstrating that acts challenged by the District Attorney were not political in nature and were not barred by the Guidelines or any of the charged statutes. For example, the District Attorney charged that Orie Melvin's law clerks were tasked with keeping a running compilation of summaries of her decided cases. This was not in any

uncontroverted that judicial staffers in Orie Melvin's chambers completed all judicial work assigned to them. (See, e.g., T 13-932 at 1473; T 13-1014 at 2438.) In addition, the evidence was undisputed that Orie Melvin had unfettered authority to set employment policies for her law clerks and judicial secretaries. (JA 118-19, 140-41.) The Director of Human Resources for the Administrative Office of Pennsylvania Courts, who was called by the Commonwealth as a trial witness, testified that appellate judges like Orie Melvin were authorized to set staff schedules and to decide how many hours law clerks and judicial secretaries would work. (JA at 119-20.) Judicial staffers did not record their time or fill out time cards or time sheets and were not required to report a minimum number of hours worked in order to receive their full salary. (JA 141-42.) Instead, Orie Melvin and other appellate judges had complete discretion to set the work schedules for law clerks and judicial secretaries. (JA 109-10.)

C. The Verdict and Sentence.

The jury returned a verdict of guilty on the theft of services charges, the misapplication of government property charge and the charge alleging conspiracy to commit tampering. The jury was unable to reach a unanimous verdict on the official oppression charge which was *nolle prossed*.

Orie Melvin was sentenced to three, one-year sentences of home confinement on the theft of services charges, with the sentences to run consecutively, followed by a total of two years of probation on the other charges and was ordered to pay a fine,

way political or improper. The District Attorney also charged that Orie Melvin's secretary maintained a calendar that included campaign appearances. This too was completely appropriate.

costs and restitution. The trial court also ordered that Orie Melvin was to be removed from the Pennsylvania Supreme Court. In addition, the trial court imposed as a condition of sentence that Orie Melvin write letters of apology to her former staff and all Commonwealth judges and directed that the apology be printed on the back of a picture of Orie Melvin wearing handcuffs.

D. Appeal to the Pennsylvania Superior Court.

Orie Melvin filed a timely notice of appeal to the Pennsylvania Superior Court. In a published decision, the Superior Court affirmed the conviction and sentence, with one exception and one modification. *Commonwealth v. Melvin*, 103 A.3d 1 (Pa. Super. 2014). The Superior Court held that requiring Orie Melvin to write letters of apology to every judge in Pennsylvania on the back of a photograph of herself in handcuffs was “illegal” and not authorized by the Pennsylvania Sentencing Code. *Id.* at 55-56. Further, the Superior Court ruled that Orie Melvin could not be compelled to write the letters of apology until after her direct appeal rights had been exhausted. *Id.* at 51. The Superior Court rejected Orie Melvin’s due process challenge in a single sentence at the end of a footnote. *Id.* at 16 n.4.

E. Petition for Writ of *Habeas Corpus*.

Orie Melvin filed a petition for writ of *habeas corpus* in the U.S. District Court for the Western District of Pennsylvania. The District Court referred the matter to U.S. Magistrate Judge Robert C. Mitchell who recommended that the petition be denied and that a certificate of appealability not be granted. U.S. District Court

Judge Mark R. Hornak adopted the Report and Recommendation *in toto*. *Melvin v. Zappala*, No. 15-1225, 2017 WL 1424030 (W.D.Pa. Apr. 20, 2017).

Orie Melvin filed a timely appeal to the U.S. Court of Appeals for the Third Circuit. The Third Circuit granted a certificate of appealability on Orie Melvin’s claim that substitution of a workplace rule for notice in a criminal statute violates due process.

F. Appeal to the Third Circuit.

The Third Circuit affirmed in relevant part. The Third Circuit acknowledged the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” *Melvin v. District Attorney Allegheny County*, 798 F. App’x 706, 708 (3d Cir. 2020) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964)), and that work rules “do not supersede or step in place of penalties proscribed under criminal statutes.” *Id.* at 709-10. The Third Circuit, however, ignored the District Attorney’s repeated invocation of the Guidelines at trial and the trial court’s reliance on the Guidelines at sentencing and concluded that Orie Melvin “was not criminally prosecuted for using her judicial staff to advance her political aspirations” but rather for using “her judicial staff in violation of criminal statutes.” *Id.* at 709 (quoting *Melvin*, 103 A.3d at 15-16). Orie Melvin filed a petition for panel rehearing and *en banc* review which was denied by the Court. Pet. App. 01.

REASONS FOR GRANTING THE PETITION

This high-profile prosecution of a Pennsylvania Supreme Court Justice is unconstitutional at its core. Due process requires fair notice of conduct that is

forbidden but the offenses charged in this case provide no notice that transgressing a workplace rule may be punished as a crime. The Third Circuit’s decision endorsing the prosecution’s reliance on a work rule as the standard of criminal liability conflicts with 100 years of authority from this Court enforcing the constitutional right to due process. This Court should issue a writ of certiorari to resolve this conflict and to prevent arbitrary criminalization of routine office policies.

This Court has long recognized the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). The offenses with which Orie Melvin was charged—theft of services, misapplication of government property and conspiracy—do not purport to prohibit or regulate political activity and do not warn that violation of an internal workplace rule may result in criminal prosecution and punishment. In an effort to fill this void and create an appearance of a deviation from a required standard, the District Attorney invoked the Guidelines which bar certain forms of political activity. The District Attorney theorized that, because the Pennsylvania Supreme Court prohibits court employees from engaging in political activity, a judge necessarily diverts government services and misapplies government property if staffers perform political tasks or use court equipment to advance a political campaign.

The Guidelines, however, are not criminal statutes. They are internal workplace rules which serve only to regulate the conduct of court employees in relation to their employment. They do not provide for or reference criminal penalties

and do not give any notice that a violation of the Guidelines may be punished as a crime. To the contrary, the Guidelines make the President Judge of each court responsible for enforcement and warn that, at worst, repeated violations may result in loss of employment. (Guidelines ¶ 4.) In this regard, the Guidelines advise that any employee who fails to “cease such partisan political activity at once” will be “terminated from his or her position.” (*Id.* ¶ 3.)

The Guidelines admittedly and by design formed the basis for the criminal charges against Orie Melvin. The Commonwealth referenced the Guidelines in the charging document, (JA 91), argued in court filings that it was theft of services for judicial staffers to perform political work because the Guidelines “prohibit[] politicking by court personnel—even on their ‘own time’” and because “political work . . . is proscribed by the very terms of the respective staffer’s court employment,” (Commw. Br. in Response to Def.’s Omnibus Pretrial Mot. at p. 8); *see also* Commw. Br. filed in Superior Court at 24-25)), questioned witnesses at trial about the prohibition against political activity in the Guidelines, (T 13-868 at 1085-86, 1190-92; T 13-932 at 1405-08, 1515-18, 1561-63, 1626-28; T 13-1014 at 2466), introduced court personnel records referencing the Guidelines as trial exhibits (JA 271-300), and invoked the Guidelines in closing argument (JA 158-159, 168). The Assistant District Attorney also argued to the jury in closing that the Guidelines established “scienter” or “guilty knowledge.” (JA 154-55.) The prosecutor further argued that the Guidelines “tell[] them,” *i.e.* judges and court employees, that “they are not supposed

to be doing political work, even outside the office" and constituted "notice that that was not permitted." (JA 168.)

The trial judge likewise relied on the Guidelines. In a post-trial opinion, the trial judge pointed to the Guidelines as ostensible proof that Orie Melvin knew what she was doing was wrong: "All Superior Court judicial employees were prohibited from participating in political activity." (JA 202; *see also* JA 205.) The trial court also invoked the Guidelines at sentencing as purported justification for the penalties imposed on Orie Melvin: "[T]here is a rule here, there is a rule here that says you can't do this." (T 13-1015 at 50; *id.* at 10, 46.) The trial court went on to say: "This . . . wasn't a matter of some hidden law. She knew what it was. Her Court passed it." (*Id.* at 50.)

The Guidelines were thus unconstitutionally substituted as the standard for criminal liability. Reliance on the Guidelines was necessary to the District Attorney's prosecution theory because judicial staffers *did not keep time records* and Orie Melvin, like all Pennsylvania appellate judges, *had complete discretion to determine the work hours of her judicial staff*. The evidence at trial was undisputed that Orie Melvin had full authority to decide how many hours her law clerks and judicial secretaries would work, (JA 119-20), and what their schedules would be, (JA 109-110). Employees in Orie Melvin's chambers were not required to fill out time sheets or keep time records or report any particular number of hours worked in order to receive their full salary. (JA 141-43.) No judicial employee was alleged to have submitted an allegedly false time card or to have made any alleged misrepresentation

to anyone concerning hours worked or tasks performed. As a result, the District Attorney could not charge theft of time or time card fraud or any other offense based on how employees spent their time. Instead, to create an *appearance* of a deviation from some required standard of conduct, the District Attorney resorted to and relied on the ban on political activity in the Guidelines.

This Court recently ruled that a criminal statute prohibiting theft of property or money by fraud could not be applied to a public official where the object of the scheme was to affect a policy, even a bad or corrupt policy. *Kelly v. United States*, --- U.S. ---, 140 S. Ct. 1565, 1572 (2020) (public official's conduct in reallocating traffic lanes was deceitful, but "was not a property fraud"). Property crimes protect property rights and may not be used to set standards of good government under a vague concept of the intangible right to honest services. *Id.* at 1574. They bar only schemes for obtaining property. *Id.*

The prosecution in Orie Melvin's case similarly sought to regulate political activity in the judiciary by use of criminal property and theft statutes.

This was a plain violation of due process as consistently construed and enforced by this Court. It is long settled that criminal laws must give fair notice of conduct that is forbidden. *See Marks v. United States*, 430 U.S. 188, 191 (1977); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A criminal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally*, 269 U.S. at 391. This Court has made clear that a conviction

violates due process if the statute under which it was obtained “fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citation omitted). The conviction in this case fails on both grounds.

First, use of a work rule to supply the standard of criminal liability violates the fair notice requirement. Reliance on extraneous material to identify the contours of a crime is not fair notice. *See, e.g., Rabe v. Washington*, 405 U.S. 313, 315-16 (1972); *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 219-20 (1920); *United States v. George*, 228 U.S. 14, 21-22 (1913). More fundamentally, crimes are defined by the legislature, not employers. Allowing prosecutors to criminalize deviations from employment policies is unconstitutional because doing so impermissibly delegates to employers and prosecutors the “inherently legislative task of determining what type of . . . activities are so morally reprehensible that they should be punished as crimes.” *United States v. Kozminski*, 487 U.S. 931, 949 (1988); *see also Skilling v. United States*, 561 U.S. 358, 410-11 (2010).

Second, basing criminal liability on workplace rules invites arbitrary enforcement in violation of the Fifth Amendment. While many workplaces have rules that regulate use of time and equipment, those rules are routinely broken without consequence. Employees commonly pursue personal interests during the workday but are rarely, if ever, disciplined when they use a company computer to make a personal purchase or send a personal email. Nor are managers or supervisors disciplined when they ask a subordinate to help with a charitable or professional

interest, assist with a personal task or pick up lunch. Permitting prosecutors to decide whether and which deviations to charge as theft or misapplication of property would subject employees everywhere to the risk of prosecution at the whim of their local district attorney. And, as in this case, that discretion can be misused by a local prosecutor to thwart the will of the people and reverse the outcome of an election. Due process forbids such arbitrary exercises of police power. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

The Third Circuit’s decision conflicts with this authority. The Third Circuit completely sidestepped the fair notice requirement in positing that the same conduct may constitute both a crime and a violation of a work rule. Pet. App. 04. This myopic view ignores the *actual* theory of prosecution in this case. The District Attorney repeatedly invoked and expressly relied on the Guidelines as the source of “notice” to Orie Melvin that “what [she was] doing was wrong.” (JA 154-55, 168.) The trial judge justified the sentence imposed on Orie Melvin by referencing the Guidelines which he claimed served as a warning that “you can’t do this.” (T 13-1015 at 50.) Resort to such extraneous material to supply the standard of criminal liability violates this Court’s repeated admonition that fair notice of proscribed conduct must appear in the criminal statute. *See, e.g., Connally*, 269 U.S. at 391. The Third Circuit’s decision cannot be squared with *Connally* and the other decisions of this Court cited herein.

Orie Melvin’s conviction is constitutionally invalid under this Court’s precedent. The implications of this case, however, extend far beyond Orie Melvin. The theory of prosecution in this case has broad implication for public and private

employees everywhere. The Third Circuit’s decision empowers prosecutors to utilize state statutes to investigate and indict any person—both private individuals and elected officials—based on alleged deviations from standards set by their employers rather than the legislature and thus authorizes what the Fifth Amendment forbids. Under the District Attorney’s theory and the Third Circuit’s ruling, the only thing standing between individuals subject to workplace rules and an indictment is prosecutorial discretion. This Court should remedy the conflict between the Third Circuit’s decision and decisions of this Court and prevent arbitrary criminalization of workplace rules.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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