

## STATEMENT OF THE QUESTIONS INVOLVED

In his order dated May 28, 2009, the Special Master ordered the parties to submit the brief herein on the following questions:

1. Does *In re McFall*, 617 A.2d 707 (Pa. 1992), require this Court to vacate all adjudications of delinquency and all consent decrees entered by Judge Mark A. Ciavarella, Jr. between 2003 and May 2008, regardless of whether or not a juvenile was represented by counsel; or does *McFall* only require vacation of a smaller set of delinquency adjudications and consent decrees?

**ANSWER:** In the affirmative. *In re McFall* requires this court to vacate all adjudications of delinquency and all consent decrees entered by Judge Mark A. Ciavarella, Jr. between 2003 and May 2008, regardless of whether or not the juvenile was represented by counsel.

2. Does the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, or the Double Jeopardy Clause of the Pennsylvania Constitution (Article I, Section 10), apply to proceedings in juvenile court in Pennsylvania? See *Breed v. Jones*, 421 U.S. 519 (1975); *Benton v. Maryland*, 395 U.S. 784 (1969).

**ANSWER:** In the affirmative. Both clauses apply to juvenile court proceedings in Pennsylvania.

3. Given the facts of the instant case, and the “judicial overreaching,” or bad faith judicial conduct, component of Double Jeopardy jurisprudence, are juveniles who have their

adjudications of delinquency or consent decrees vacated pursuant to *McFall* entitled to dismissal of the charges against them on the theory that new hearings or re-trials would be barred by the Double Jeopardy Clause of the U.S. Constitution or the Double Jeopardy Clause of the Pennsylvania Constitution? See *United States v. Jorn*, 400 U.S. 470 (1971), and *United States v. Diniz*, 424 U.S. 600 (1976), modified by *Oregon v. Kennedy*, 456 U.S. 667 (1982); see also *Com. v. Smith*, 615 A.2d 321 (Pa. 1992) (Double Jeopardy Clause of the Pennsylvania Constitution).

**ANSWER:** In the affirmative. The Double Jeopardy Clause of the Pennsylvania Constitution bars retrial of juveniles who have their adjudications of delinquency or consent decrees vacated.

## STATEMENT OF THE CASE

As acknowledged in this Court's Orders of March 26, 2009 and May 4, 2009, Petitioners *J.V.R. et al.*, were the victims of an unprecedented judicial corruption scandal which spanned at least five years, from 2003 through 2008, and involved thousands of children. *In Re: J.V.R.: H.T.*, a Minor through her Mother, LT., No. 81 M.M. 2008, orders dated March 26, 2009 and May 4, 2009, and 1<sup>st</sup> Interim Report and Recommendations of the Special Master dated March 12, 2009. It is undisputed that former Luzerne County Court of Common Pleas judges Mark A. Ciavarella, Jr., and Michael T. Conahan accepted over \$2.6 million in kickbacks from the developer, owners and operators of two private for-profit juvenile correctional facilities in exchange for their assurance that the beds in these facilities would be filled by Luzerne County children. *United States of America v. Michael T. Conahan and Mark A. Ciavarella, Jr.*, Docket No. 3:09-CR-028, Bill of Information (hereinafter "bill of information"), ¶¶ 5, 11, 22, and 35-36. As part of this quid pro quo scheme, it is also undisputed that Petitioners were routinely and systematically denied their constitutional rights to counsel, to an impartial tribunal, to be free from compelled self incrimination and to enter guilty pleas only upon a voluntary, knowing and intelligent waiver of their right to trial. *In Re: J.V.R.: H.T.*, No. 81 M.M. 2008, 1<sup>st</sup> Interim Report and Recommendations of the Special Master dated March 12, 2009, ¶ 10.

The record begins in 1999 when undersigned counsel successfully appealed the delinquency adjudication of a thirteen year-old boy from Luzerne County. *In re A.M.*, 766 A.2d 1263 (Pa. Super. 2001), attached at Ex. A. The Pennsylvania Superior Court found that A.M., who appeared without counsel at his at his adjudication and disposition hearings in the Luzerne County juvenile court, was unfairly denied his constitutional and statutory rights to counsel 766 A.2d at 1264-65. The Superior Court held that the judge's failure to inform A.M. of his right to

counsel and his right to have court appointed counsel if he could not afford representation, as well as the court's failure to obtain a valid waiver of counsel, required that A.M.'s delinquency adjudication be vacated and the case be remanded. *Id.* at 1264-65.<sup>1</sup> Mark A. Ciavarella, Jr., who was then juvenile court judge of the Court of Common Pleas of Luzerne County and presided over A.M.'s disposition hearing, was quoted in the local newspaper after the Superior Court overturned A.M.'s adjudication. "I'll never do it again," Ciavarella said of allowing a defendant to proceed without a lawyer. "They obviously have a right to a lawyer, and even if they come in and tell me that they don't want a lawyer, they're going to have one." Michael McNarney, *Superior Court Overturns Ruling in Child's Case: Judge Mark A. Ciavarella Should Not Have Found a Boy Delinquent in a 1999 Case, The Court Says*, January 6, 2001, WILKES-BARRE TIMES LEADER, attached at Ex. B.

But undersigned counsel continued to receive troubling calls from the families of other children who appeared before Ciavarella. Like A.M., these children appeared without counsel and were never informed by Ciavarella that they had a right to counsel and to court-appointed counsel if they could not afford representation, nor did they make appropriate waivers of their right to counsel. Like A.M., their adjudicatory and disposition hearings took place in a matter of minutes; the court did not advise them of their right to trial and the consequences of pleading guilty.

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<sup>1</sup> In the brief filed with the Superior Court, undersigned counsel raised a total five issues for the Superior Court's review in arguing that A.M.'s adjudication should be vacated. *A.M.*, 766 A.2d at 1264, including that that his admission to the crime charged was constitutionally invalid because it was not voluntary, knowing and intelligent. *See Id.* at 1264 n.1 (reproducing adjudication hearing transcript). The Superior Court, however, never reached these other issues because the Commonwealth conceded that A.M. was unfairly denied counsel at both hearings. *Id.* at 1264-65.

H.T.'s experience was typical of the cases. On April 17, 2007, H.T., then a fifteen year old, appeared before Ciavarella for an adjudication hearing on a charge of harassment, a third degree misdemeanor. *See* Ex. C, Tr. of Adjudicatory Hearing, *In the Interest of H.T.*, Juvenile No. 2007-74, In the Court of Common Pleas of Luzerne County, 11<sup>th</sup> Judicial District, Juvenile Section. H.T. did not have private counsel, nor was she appointed counsel; but at no point during the adjudication hearing did Ciavarella explain the consequences of proceeding without counsel. *Id.* H.T. admitted creating the website in question. *Id.* Ciavarella did not conduct a colloquy with H.T. on the record to explain her rights and the consequences of waiving her right to a trial. *Id.* Although H.T. had no prior contact with the juvenile justice system and was adjudicated for a third degree misdemeanor, the court immediately committed her to a residential treatment facility. *Id.* On May 3, 2007, undersigned counsel entered its appearance as counsel for H.T., filed a timely notice of appeal in the Superior Court, and simultaneously filed applications in Luzerne County juvenile court seeking H.T.'s immediate release. *See* Ex. C, Entry of Appearance; Notice of Appeal; Application for *Supersedeas*; Petition for Writ of *Habeas Corpus*, *In the Interest of H.T.*, Juvenile No. 2007-74. These filings argued that the juvenile court had violated H.T.'s due process rights by, *inter alia*, allowing her to proceed without counsel in the absence of a valid waiver of counsel and accepting an un-counseled admission which was not voluntary, knowing and intelligent. *Id.* In May 2007, the juvenile court vacated its original April 17th delinquency adjudication and disposition orders, placed H.T. on a consent decree and released her to the custody of her parents. *See* Ex. C, Juvenile Division Court Order dated 5/16/2007, *In the Interest of H.T.*, Juvenile No. 2007-74. H.T., through undersigned counsel, subsequently withdrew her notice of appeal. *See* Ex. C, *Praecipe* to Discontinue

Appeal, No. 788 MDA 2007, *In the Interest of H.T.*, In the Superior Court of Pennsylvania for the Middle District.

Despite the Superior Court's reversal of Ciavarella in *A.M.* and Ciavarella's own grant of relief in H.T.'s case on the grounds of due process violations, Ciavarella continued in a flagrant and persistent pattern and practice to deny youth their right to counsel and to accept constitutionally invalid guilty pleas as the basis for adjudications. Undersigned counsel and *pro bono* attorneys assisted a number of youth in having their adjudications before Ciavarella vacated on the same due process grounds.<sup>2</sup> However, it became apparent that traditional means

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<sup>2</sup> For example, in April 2008, M.Y., then sixteen, was adjudicated delinquent for possession of less than five dollars worth of marijuana. M.Y. appeared without counsel before Ciavarella and admitted to the charge. See Ex. D, Tr. of Adjudicatory Hearing, *In the Interest of M.Y.*, Juvenile No. 086-2008, In the Court of Common Pleas of Luzerne County, 11<sup>th</sup> Judicial District, Juvenile Section. Despite the fact that M.Y. was an honor student and this was her first offense, Ciavarella placed M.Y. outside of her home. *Id.* A pro bono attorney filed an application of *supersedeas* and a writ of *habeas corpus* challenging the constitutionality of her adjudication and detention. See Ex. D, *In the Interest of M.Y.*, Application for *Supersedeas* and Petition for Writ of *Habeas Corpus*, Juvenile No. 086-2008. In response to the filings, the juvenile court released M.Y. to her parents and vacated the adjudication. See Ex. D, *In the Interest of M.Y.*, Report of Juvenile Court Showing Disposition dated 6/12/08 and Juvenile Division Court Order dated 5/13/08, Juvenile No. 086-2008.

In October 2007, when S.S. was sixteen years old, S.S. was charged with driving without a license and presenting false identification to the police in Dauphin County. That month, S.S. appeared, with an attorney, before the Dauphin County Juvenile Court and made a counseled admission to the charges. The Dauphin County court then transferred the case to the Luzerne County Juvenile Court as S.S. was a resident of Luzerne County. See Ex. E, *In the Interest of S.S.*, Petition for Writ of *Habeas Corpus*, Juvenile No. 477-2007, In the Court of Common Pleas of Luzerne County, 11<sup>th</sup> Judicial District, Juvenile Section. On November 14, 2007, S.S. appeared without counsel before Ciavarella for an adjudication/disposition hearing, but Ciavarella did not ascertain whether S.S. knew he had the right to counsel, nor did the court obtain an affirmative waiver of counsel from S.S. on the record. *Id.* Ciavarella ordered that S.S. be placed at Glen Mills School for an indefinite period. *Id.* In July 2008, undersigned counsel filed a writ of *habeas corpus*, challenging the constitutionality of his adjudication and detention. *Id.* On July 31, 2008, the Hon. David Lupas issued an order releasing S.S. from his commitment at Glen Mills and vacating the delinquency adjudication and disposition of November 14, 2007. See Ex. E, *In the Interest of S.S.*, Order dated 7/31/08, Juvenile No. 477-2007.

On April 22, 2008, K.W. was adjudicated delinquent on a simple assault charge in a hearing before Ciavarella at which he made an admission. See Ex. F, *In the Interest of K.W.*, Petition for Writ of *Habeas Corpus*, Juvenile No. 2007-74, In the Court of Common Pleas of Luzerne County, 11<sup>th</sup> Judicial District, Juvenile Section. A public defender did appear with K.W. at the hearing, but the public defender did not explain to K.W. his rights or the possible consequences of making an admission. *Id.* Ciavarella ordered that K.W. be placed at Camp Adams for an indeterminate period of time. *Id.* In May 2007, undersigned counsel filed a writ of *habeas corpus* on K.W.'s behalf, challenging the constitutionality of K.W.'s adjudication and detention. *Id.* On June 18, 2008, the court granted the writ; K.W.'s delinquency adjudication was vacated and he was released from Camp Adams. See Ex. F, *In the Interest of K.W.*, Order dated 6/18/09, Juvenile No. 2007-74.

of challenging and reforming a court's errant practices – appeals, applications for supersedes and writs of habeas corpus – were not prompting Ciavarella to change his behavior. For that reason, undersigned counsel finally filed the Application for Exercise of King's Bench Power in the Instant Case on April 28, 2008. *See In Re: J.V.R.: H.T., a Minor through her Mother, LT., No. 81 M.M. 2008, Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction.* This Court denied the Application on January 8, 2009. *Id.*, order dated 1/8/09.

On January 26, 2009, the United States Attorney for the Middle District of Pennsylvania filed a federal information detailing Ciavarella's and Conahan's corruption scheme and charging the judges with violations of provisions of the federal crimes code. Upon the filing of the federal information, Ciavarella and Conahan pled guilty to two of the allegations against them and agreed to serve a sentence of 87 months in a federal prison. As the federal information states, inter alia:

The Defendants Michael T. Conahan and Mark A. Ciavarella, Jr., through their actions, facilitated the construction of juvenile detention facilities and an expansion to one of those facilities by PA Child Care and Western PA Child Care and directed that juvenile offenders be lodged at juvenile detention facilities operated by PA Child Care and Western PA Child Care. Through their actions, the defendants assisted PA Child Care and Western PA Child Care to secure agreements with Luzerne County worth tens of millions of dollars for the placement of juvenile offenders, including an agreement in late 2004 worth approximately \$58,000,000. It was further a part of the scheme and artifice to defraud that, on numerous occasions, accused juvenile offenders were ordered detained by the defendant Mark A. Ciavarella, Jr. even when Juvenile Probation Officers did not recommend detention. The defendant Mark A. Ciavarella, Jr., and others operating at his behest, also exerted pressure on staff of the Court of Common Pleas to recommend detention of juvenile offenders. On some occasions, probation officers were pressured to change recommendations of release to recommendations of detention.

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It was further a part of the scheme and artifice to defraud that the defendants Michael T. Conahan and Mark A. Ciavarella, Jr. violated their duties of independence, impartiality and integrity in the exercise of their discretionary actions on behalf of the Court of Common Pleas for Luzerne County by failing to recuse themselves from acting in matters in which they had a material conflict of interest and in failing to disclose to parties appearing before the court their conflict of interest and their financial relationship with Participant #1, Participant #2, PA Child Care and Western PA Child Care, which were material matters.

Bill of information, ¶¶ 35-36.

Undersigned counsel subsequently filed a motion for reconsideration and for leave to amend its original application on January 29, 2009. *In Re: J.V.R.: H.T.*, No. 81 M.M. 2008, Motion of J.V.R., H.T. et al, for Reconsideration of Denial of Application and to Amend Application. By order of February 11, 2009, this Court assumed plenary jurisdiction over this matter and appointed the Hon. Arthur E. Grim, Senior Judge of Berks County, as Special Master to act on behalf of the Court. *In Re: J.V.R.: H.T.*, No. 81 M.M. 2008, order dated 2/11/09. The court charged the Special Master with reviewing the Luzerne County juvenile court adjudications and dispositions and making recommendations to the Court concerning appropriate remedial actions. *Id.*

To date, the Special Master has made a number of finding of facts. In the First Interim Report and Recommendations to the Court, dated March 12, 2009, and adopted and approved by the Court by order dated March 26, 2009, the Special Master stated:

My preliminary investigation, including in-chambers discussions on February 17, 2009 with the Chief Public Defender, the First Assistant District Attorney, and the Chief Deputy Juvenile Probation Officer, points to the conclusion that a very substantial number of juveniles who appeared without counsel before Judge Ciavarella for delinquency or related proceedings did not knowingly and intelligently waive their right to counsel. My investigation has also uncovered evidence that there was routine deprivation of children's constitutional rights to appear before an impartial tribunal and to have an opportunity to be heard.

1<sup>st</sup> Interim Report and Recommendations of the Special Master dated March 12, 2009 at ¶ 10.

The daily juvenile court lists for 2003-2008 maintained by the Luzerne County Juvenile Probation Office, provided to the Special Master and released to undersigned counsel and to the Luzerne County District Attorney's Office, confirm the finding that a significant portion of children appeared without counsel and did not validly waive that right.

Moreover, the evidence shows that the judges were rewarded for ensuring a steady flow of children to these two facilities, which had entered into lucrative contracts with Luzerne County to pay for their confinement at a rate calculated to ensure a profit for the facilities' owners and operators. The agreements entered into by Luzerne County and the Luzerne County Court of Common Pleas, with PA Child Care, Western PA Child Care, and Mid-Atlantic Youth Services<sup>3</sup> demonstrate that the amount of monies these entities received was directly tied to the number of children that Luzerne County placed at these facilities. Pursuant to the 2003 placement agreement between the County, the Court and PA Child Care, the County paid a per diem rate of \$268 per day for each detention bed and \$300 per day for each secure treatment bed in which the county placed a child that year. *See* Ex. G, Placement Agreement dated 2002. In 2004, that rate increased to \$280 and \$312, respectively, for each bed that a Luzerne County child filled. *See* Ex. H, Placement Agreement dated 2004.

This per diem, per child placement arrangement at PA Child Care lasted until the county entered into a twenty-year, \$58 million lease with PA Child Care. *See* Ex. I, Lease Agreement dated November 17, 2004. At that time, Luzerne County negotiated a facility management agreement with Mid-Atlantic Youth Services to run the PA Child Care facility. *See* Ex. J, Juvenile Detention Facility Management Agreement, dated May 1, 2005. Under this

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<sup>3</sup> Undersigned counsel received these documents from Luzerne County in response to our request under Pennsylvania's Right to Know Law.

Management Agreement, the County paid a fixed amount of money -- \$3.5 million annually in monthly installments of \$288,052.50 monthly – for Mid-Atlantic to operate the facility. *Id.* at ¶ 6. Notably, under the terms of the same agreement, if the facility’s actual operating costs were less than the budgeted costs submitted to the county, Mid-Atlantic would have to remit to the county 100% of the first \$50,000 and 50% of any further savings thereafter. *Id.* at ¶ 6 and Appendices. Again, this created an incentive for Mid-Atlantic to keep beds filled so that the entity would not have to return monies to the County. Accounting statements show that from June 15, 2006 through April 17, 2009, the County paid more than \$12 million to Mid-Atlantic for management of the facility. *See* Ex. K., ACS Financial Services Printout dated 4/27/09, Luzerne County Vendor Payments History Report to MAYS. Moreover, from January 1, 2005 through May 27, 2008, the county paid more than \$10 million in rent to PA Child Care. *See* Ex. L, ACS Financial Services Printout dated 4/27/09, Luzerne County Vendor Payments History Report to PA Child Care.

In 2007, the County and Court also entered into separate placement and purchase of service agreements with Western PA Child Care. Under a placement agreement, the County paid a per diem, per child rate of \$200-210 for each shelter care bed at the Butler County facility filled by a Luzerne child. *See* Ex. M, Placement Agreement dated June 1, 2007 at § X. The County also agreed to purchase treatment beds at a per diem, per child rate of \$255-\$314. *See* Ex. N, Purchase of Service Agreement dated July 1, 2007 at § XI and Attachment C. Again, under these agreements, the monies to be collected by Western PA Child Care from Luzerne County increased with each child placed in their facility. Indeed, accounting statements show that from March 2006 through May 2008, Western PA Child Care collected almost \$2.3 million from Luzerne County for shelter and treatment beds filled by Luzerne children. *See* Ex. O, ACS

Financial Services Printout dated 4/27/09, Luzerne County Vendor Payments History Report to Western PA Child Care.

Thus, the record cited above establishes that Ciavarella engaged in a persistent practice of violating youths' right to counsel and other critical due process rights throughout the period in question, despite repeated notice as to the illegality of these practices. At the same time, Ciavarella had a conflict of interest in presiding over juvenile delinquency proceedings as he had undisclosed financial interests in certain juvenile facilities.

## SUMMARY OF THE ARGUMENT

Petitioners are entitled to the immediate vacatur and expungement of their juvenile adjudications or consent decrees. It is well settled under both United States Supreme Court case law and Pennsylvania case law that once even the appearance of impropriety is present, the failure of judges to disqualify or recuse themselves is a violation of litigants' due process rights to a fair and impartial tribunal and the judgments against them must be reversed. The standard to be applied is an objective one -- the Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' In the case at bar, the unprecedented combination of the judges' receipt of more than \$2.6 million in kickbacks from private, for profit juvenile correctional facilities and Ciavarella's persistent and systematic denial of juveniles' due process rights over a five year period creates a constitutionally intolerable conflict of interest that can only be remedied by vacating and expunging their adjudications.

Nor may juveniles be re-tried once their adjudications or consent decrees are reversed. The double jeopardy clause applies to juvenile adjudications. Pursuant to both the United States and Pennsylvania Constitutions, re-trial is barred where there is a finding of either judicial or prosecutorial misconduct. Both are present here. Ciavarella's denial of petitioners' long-established constitutional and statutory rights to counsel, right to be from compelled self incrimination and to a colloquy before entering admissions to delinquency charges constitutes judicial misconduct barring re-trial. Likewise, the district attorney's unbroken silence in the face of Ciavarella's conduct over a five year period constitutes prosecutorial misconduct that bars re-trial. In both instances, Ciavarella and the District Attorney evinced an intent that the juveniles be adjudicated delinquent "by any means necessary." Finally, double jeopardy bars the re-trial

of all youth who were adjudicated delinquent by, or received consent decrees from, Ciavarella during the same time period, because his conduct in accepting the bribes and not disclosing the conflict over a period of five years denied these youth a fair trial.

## **ARGUMENT**

The proceedings before this Court are about nothing less than the wholesale subversion of the Luzerne County juvenile justice system over a period of many years. Ciavarella and Conahan have demonstrated the worst of our judiciary, allowing greed and self-interest to trump their obligations to uphold the law and, in Ciavarella's case as a juvenile court judge, to also rule in the best interests of children. Surely self-dealing at the expense of children is the most egregious violation of the public trust. A large shadow has been cast over the reputation of the Luzerne County Juvenile Court by their actions, severely compromising its integrity and impartiality. As a consequence, the community's trust in the judiciary has been severely shaken, and youths' respect for the rule of law diminished. Only by providing swift and complete redress to the children and families who fell prey to this scandal can this Court assure the citizens of Luzerne County and the Commonwealth that justice will be done; only by providing swift and complete redress to these children and families can this Court demonstrate that it will not ignore our core values of fairness and justice.

**I. IT IS WELL ESTABLISHED THAT ONCE EVEN THE APPEARANCE OF IMPARTIALITY HAS BEEN CALLED INTO QUESTION, LITIGANTS HAVE BEEN DENIED THEIR RIGHT TO A FAIR TRIAL AND THE JUDGMENTS MUST BE VACATED**

In its Order of February 11, 2009 accepting jurisdiction of Petitioners' application for

Kings Bench jurisdiction, this Court appointed the Honorable Arthur Grim as Special Master to review Petitioners' cases and make recommendations. *In Re: J.V.R.: H.T.*, a Minor through her Mother, LT., No. 81 M.M. 2008, order dated February 11, 2009. Specifically, this Court directed the Special Master to

[recommend] remedial action on an individual basis, a class basis, or both. Relief may include any remedy that may be awarded by a juvenile court or appellate court directly reviewing an adjudication including, but not limited to, expungement, granting new juvenile court proceedings, or finding that the affected juvenile proceedings were void *ab initio*.

*Id.* at ¶ 4. In its subsequent Order of May 4, this Court identified a first class of Petitioners whose adjudications were to be vacated and expunged, with additional classes of children to be identified as eligible for vacatur and expungement over a period of several months. *In Re: J.V.R.: H.T.*, a Minor through her Mother, LT., No. 81 M.M. 2008, order dated May 4, 2009. Petitioners submit that all children who were adjudicated by Ciavarella during the relevant five year time period have an identical and well-established right to vacatur and expungement of their adjudications under the circumstances herein. Petitioners now ask this Court to proceed forthwith to void their adjudications *ab initio* and order expungement of their records.

**A. United States Supreme Court Precedent Requires Disqualification of Judges and Reversal of Judgments Where Litigants' Due Process Rights to an Impartial Tribunal Have Been Violated**

“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” *Caperton v. A.T. Massey Coal Co.*, No. 08-22, 2009 U.S. Lexis 4157 at \*15 (June 8, 2009) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). In *Caperton*, a decision issued on June 8, 2009 by the United States Supreme Court, the Court reiterated its long-standing principle that the

test of whether a litigant's fundamental right to a fair trial has been breached is an objective test: "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at \*24.

The facts in *Caperton*, exceptional in their own right, only underscore petitioners' rights to reversal of their adjudications here. *Caperton* involved an appeal of a \$50 million jury verdict against the defendant, A.T. Massey Coal Company. The timing of Massey's appeal of the verdict coincided with West Virginia's judicial elections, including a contested election for a seat on the State Supreme Court of Appeals, the Court which would hear the appeal. Massey's chairman and principal officer contributed \$3 million to the election campaign of the candidate seeking to replace the incumbent justice on the Court; this amount exceeded by 300% the amount spent by the candidate's campaign committee and eclipsed the total amount spent by all other supporters of the candidate.

Massey's candidate won; the incumbent justice lost. *Caperton* moved to disqualify the new justice under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Massey's chairman's campaign involvement. The newly elected Justice declined to recuse himself and the Court reversed the jury verdict in a 3-2 decision, with the new Justice in the majority. *Caperton* sought rehearing and renewed his request for disqualification of the newly elected Justice; he again refused and a divided Court again reversed the jury verdict. The new justice remained in the majority. *Caperton* sought review in the United States Supreme Court.

The Court reversed the judgment of the West Virginia State Supreme Court of Appeals. The Court reviewed its prior precedents and, while noting it had not previously addressed the

issue of judicial bias in the context of judicial elections, the principles set forth in those cases required reversal in *Caperton*. See *Tumey v Ohio*, 273 U.S 510, 535 (1927) (Where Mayor of a village also sat as a judge and had the authority to impose fines on those found to have illegally possessed alcoholic beverages, but fines both determined the amount of any additional salary he earned as a judge as well as benefited the general treasury of the village, Court found the Due Process Clause required disqualification because the mayor-judge had both a direct, pecuniary interest in the outcome and an official motive to convict and fine defendants to help the financial needs of the village.); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (Mayor also had power to assess fines, but monies went directly to general fisc; in invalidating a conviction by the Mayor, Court held that “[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle.” The principle turned on the “possible temptation” the mayor might face in discharging his executive responsibilities to maintain a high level of contribution to the village’s finances); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (an administrative board composed of optometrists had a pecuniary interest of sufficient substance so that it could not preside over a hearing against competing optometrists; Court wrote “the [judge’s] financial stake need not be as direct or as positive as it appeared to be in *Tumey*); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-825 (1986) (Court required recusal of Alabama Supreme Court justice who had cast the deciding vote to uphold a punitive damages award against an insurance company for bad faith refusal to pay a claim where justice was also a lead plaintiff in a nearly identical lawsuit pending in Alabama’s lower courts; Court noted the proper constitutional inquiry was “whether sitting on the case then before the Supreme Court of Alabama ‘would offer a possible temptation to the average ...judge to ...lead him not to hold the balance nice, clear and true.’”) (citations omitted), See also *In re Murchison*, 349 U.S. 133 (1955) (Due process Clause required

disqualification and reversal of convictions where judge had also participated in decision to charge defendants); *Mayberry v Pennsylvania*, 400 U.S. 455 (1971) (Due Process clause required that defendant in a criminal contempt proceeding should be given a public trial before a judge other than the one reviled by the contemnor); *Connally v. Georgia*, 429 U.S. 245 (1977) (holding that criminal conviction must be vacated where justice of the peace issuing search warrants received a fee for each warrant he issued; justice of the peace was not neutral and detached magistrate because he had pecuniary interest in issuing warrant in defendant's case); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (“When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.”) (citation omitted).

In reversing the State Supreme Court of Appeals, the Supreme Court noted that “[t]hough not a bribe or criminal influence, [the new justice] would nevertheless feel a debt of gratitude to [Massey’s chairman] for his extraordinary efforts to get him elected.” 2009 U.S Lexis at \*24. Applying its longstanding objective test, the Court reiterated: “Due Process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average... judge to...lead him not to hold the balance nice, clear and true.’” *Id.* at \*31 (citation omitted).

As the Supreme Court expressly acknowledged in *Caperton*, it was confronted with an extraordinary situation involving an exceptionally large campaign contribution that required recusal under the Constitution. The facts in the case at bar are stunningly similar – and worse. While the amount of money involved is nearly identical -- \$2.6 million vs. \$3 million – the

money in this case went directly into the pockets of Ciavarella and Conahan, not into a political war chest that could not be directly accessed for personal financial gain. The objective, unconstitutional probability of bias is plainly present; indeed, as in *Caperton*, this case presents “a serious, objective risk of actual bias...” *Id.* at \*32.

### **B. Pennsylvania Case Law Requires Disqualification of Ciavarella and Reversal of the Judgments Below**

As stated by this Court, “[a] tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings.” *In the Interest of McFall*, 617 A.2d 707, 714 (Pa. 1992). Pennsylvania case law is in accord with the U.S. Supreme Court rulings in this area.

In *McFall*, this Court held that once even the appearance of impartiality of the court is called into question – as it has been in the Luzerne County Juvenile Court – defendants have been denied their right to a fair and impartial tribunal; their convictions must be set aside, and they must be granted new trials. 617 A. 2d at 711 (holding that defendants must be granted new trials in their criminal cases when judge failed to reveal circumstances that raised questions about her impartiality). In *McFall*, this Court’s ruling that the defendants’ convictions and adjudications be vacated was based on its finding that the judge’s “agreement [to assist law enforcement] ...presents a situation palpably creating a circumstance where she would have an interest in the outcome of the criminal cases tried before her.” *Id.* at 713. Given the trial judge’s desire to cooperate with law enforcement to minimize or avoid her own prosecution in the Philadelphia ‘roofers’ scandal,<sup>4</sup> the likelihood that she would favor the prosecution in these criminal cases

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<sup>4</sup> In the Special Master’s briefing order of May 28, 2009, the Special Master asked counsel for the petitioners to inform the Special Master whether any other Philadelphia judge disciplined or removed from the bench as a result of the Roofer’s Union scandal had all, or a substantial number of, his or her rulings, decisions, verdicts or sentences vacated. *In Re: J.V.R.: H.T.*, No. 81 M.M. 2008, order dated May 28, 2009 at ¶ 1.2. Unfortunately, undersigned counsel was not able to ascertain that information.

justified vacatur for all defendants, including defendants who had appeared before her only at the preliminary hearing stage. As this Court stated, “the impartiality of the court, which is a fundamental prerequisite of a fair trial, must be deemed compromised by appearance alone, thus eliminating the need for establishing actual prejudice.” *Id.* at 711.

Similarly, in the instant case, Ciavarella’s alleged financial dealings with PA Child Care and Western PA Child Care gave him an interest in the juvenile delinquency proceedings over which he was presiding. Indeed, his interest is far more direct than Judge Cunningham’s interest in *McFall*. Judge Cunningham hoped for leniency from law enforcement, but the conduct for which she was being investigated had nothing to do with the substance of the criminal cases over which she presided. Here, Ciavarella’s opportunity for personal financial gain was directly connected to his disposition of the cases before him; every child he adjudicated and placed in one of the two private for profit juvenile correctional facilities was yet another opportunity to justify the substantial financial rewards he was reaping at the children’s expense. *See also In re: Schlesinger*, 172 A. 2d 835, 841 (Pa. 1961) (where circumstances suggested an unsympathetic predisposition toward the appellant, order of disbarment reversed; “[A] predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely, ‘a possible temptation to the average man as a judge...not to hold the balance nice, clear and true’ is sufficient.”)

### **C. State and Federal Codes of Judicial Conduct Require Disqualification of Ciavarella and Reversal of the Judgments Below**

Additional support for vacating the adjudications of children who appeared before Ciavarella may also be found in cases addressing the disqualification of judges, under either state or federal versions of the Code of Judicial Conduct. In *Liljeberg v. Health Services Acquisition*

*Corp.*, 486 U.S. 847 (1988), the United States Supreme Court articulated a three-part test for determining whether a judgment should be vacated for a violation of 28 U.S.C § 455, which sets forth the grounds for judicial disqualification based upon the ABA Code of Judicial Conduct, Canon 3c (1987).<sup>5</sup> *Liljeberg* involved an action for declaratory judgment to determine the ownership of a corporation; plaintiff filed a motion to vacate the judgment of the trial judge based on the contention that the trial judge should have recused himself because he was a trustee of a university which had an interest in the litigation. The Supreme Court agreed with plaintiff that the trial judge should have recused himself, and that his failure to do so required vacatur of the judgment below.

Notably, scienter has not been held to be a requirement of section 455(a); the Court has recognized that the judge’s lack of knowledge does not eliminate the risk that “his impartiality might reasonably be questioned” by other persons. *Liljeberg*, 486 U.S. at 859.<sup>6</sup> In the case at bar of course, it can hardly be questioned that Ciavarella had full knowledge of his financial interest in the adjudication and placement of petitioners.

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<sup>5</sup> 28 U.S.C § 455 provides in relevant part that

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

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(4) He knows that he, individually or as a fiduciary...has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

<sup>6</sup> As the Court of Appeals explained, and the Supreme Court agreed, “The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible (citation omitted)... . Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.” 486 U.S. at 862 (quoting the Court of Appeals decision, 796 F.2d at 802).

Additionally, recognizing that section 455 does not, on its own, authorize the vacatur of prior judgments, the Court concluded that in determining whether a judgment should be vacated for a violation of section 455, “it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.” *Id.* at 863. The Court went on, “We must continuously bear in mind that to perform its high function in the best way, justice must satisfy the appearance of justice.” *Id.* (internal quotations omitted) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Based on the facts before it and applying this three part test, the Court affirmed the opinion of the Court of Appeals vacating the judgment below, finding the violation “neither insubstantial nor excusable,” *Liljeberg*, 486 U.S. at 867, where despite the trial judge’s claimed lack of knowledge of his fiduciary interest in the litigation, “he certainly should have known.” *Id.* at 868.

*Powell v. Anderson*, 660 N.W. 2d 107 (Minn. 2003) is also instructive. In *Powell*, the Minnesota Supreme Court was asked to vacate an opinion of the Minnesota Court of Appeals on the ground that the author of the opinion was disqualified because the law firm that represented certain respondents was the same firm that represented a trust for which the authoring judge was the trustee. Applying Minnesota’s rules regarding disqualification of judges, which were themselves based on the ABA Standards Relating to Appellate Courts,<sup>7</sup> the Minnesota Supreme Court specifically held that an appellate judge should be subject to disqualification on the grounds set forth in the Code of Judicial Conduct.<sup>8</sup> 660 N.W.2d at 114-15.

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<sup>7</sup> The *Powell* court also noted that there were considerable similarities between the federal and state standards for disqualification and thus found it entirely appropriate to look to *Liljeberg* for guidance.

<sup>8</sup> Canon 3(d)(1) of the Minnesota Code of Judicial Conduct provides that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned...” The Advisory Committee’s commentary to the Rule explains “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific rules...apply.” 660 N.W. 2d at 114.

The court then considered whether the judge’s failure to disqualify himself required that the Court of Appeals decision be vacated and the case reversed. The court adopted the United State Supreme Court’s *Liljeberg* test for vacatur, observing that it properly considers each of the two objectives of disqualification: “to provide the parties a fair trial...and to promote confidence in the judicial system.” *Id.* at 121. The court ruled vacatur was proper, concluding specifically that the risk of prejudice to the plaintiff was substantial and that the risk of undermining the public’s confidence in the judicial system was also significant. On this last point, the court noted the appearance of impropriety was especially troublesome, where the judge faced possible criminal consequences as a result of his relationship with the law firm. *Id.* at 124. Here, where both Ciavarella and Conahan have not only been charged criminally but have pled guilty and agreed to serve significant prison terms, failure to vacate the petitioners’ adjudications poses perhaps the greatest risk of undermining the public’s confidence in the judicial system. *See also Blaisdell v. City of Rochester*, 609 A. 2d 388, 391 (N.H. 1992) (Court noted that “[w]hether an appearance of impropriety exists is determined [by] an objective standard, i.e., would a reasonable person, not the judge himself, question the impartiality of the court;” Court then vacated the ruling below, stating “it would be inconsistent with the goals of our [judicial] code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of impartiality, but then

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The Pennsylvania Code of Judicial Conduct in turn states that

- (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

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(c) they know that they, individually or as a fiduciary, or their spouse or minor child residing in their household, have a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding...

Code of Jud. Conduct, Canon 3(c) (2009).

to allow a judge's ruling to stand when those standards have been violated.”); *Roberts v. Bailar*, 625 F.2d 125 (6th Cir.1980) (dismissal of plaintiff's suit below reversed where judge should have recused himself because a reasonable person would question his impartiality; court noted shift in 1974 amendments to 28 U.S.C. §455 explicitly towards the appearance standard of impartiality to promote public confidence in the judiciary); *Mejia v. U.S.*, 916 A.2d 900 (D.C. App. 2007) (Where an informed and objective observer could perceive an appearance of bias, the “integrity of the judicial process” is “compromised.” Such bias was found and the case reversed and remanded.); *Scott v. U.S.*, 559 A.2d 745 (D.C. App. 1989) (Appearance of bias warrants grant of new trial); *Com. v. Druce*, 848 A.2d 104 (Pa. 2004) (A judge should recuse himself where failure to do so would give the appearance of bias and undermine public confidence in the judiciary.); *Forsmark v. State*, 349 N.W.2d 763 (Iowa 1984) (Where, at the time of trial a wrongful death action was pending against the appellants' chief medical witness by the estate of the judge's brother, the judge should have recused himself because of the appearance of bias.); *Home Paramount Pest Control v. Gibbs*, 953 A.2d 219 (Del. 2008) (Substantial overlap between current claim and hearing officer's similar claim from several years earlier interfered with the objective impartiality under Judicial Canon 3(c)(1) and case was reversed and remanded); *State v. Brown*, 776 P.2d 1182 (Haw. 1989) (Where the appearance of impropriety causes the reasonable person to question the impartiality of the judge, allowing the judge to continue to sit violates due process.)

Again – these facts pale in comparison to the case at bar. Not only did Ciavarella have knowledge of his pecuniary interest in the case before him, application of the United States Supreme Court's three part test likewise compels vacatur of petitioners' adjudications. The risk of injustice to the petitioners in these cases in the absence of vacatur is exceptionally high; the

risk that denial of relief will produce injustice in other cases is also high, both with respect to Petitioners' own ability to proceed with their civil claims against Ciavarella, Conahan and their co-conspirators as well as the negative effects of such a ruling on future litigants whose rights were similarly violated; and the risk of undermining the public's confidence in the judicial process from allowing these adjudications to stand is significant. Indeed here, where both Ciavarella and Conahan have not only been charged criminally but have pled guilty and agreed to serve significant prison terms, failure to vacate the petitioners' adjudications poses perhaps the greatest risk of undermining the public's confidence in the judicial system.

This judicial corruption scandal has received not only state and national attention, the scandal has been covered extensively by the international press. With such widespread knowledge of what happened in Luzerne County, we risk significantly undermining the integrity of our judicial system in the eyes of the world should we do nothing to address the grievous wrongs committed here. As the United States Supreme Court wrote with specific reference to judicial codes of conduct:

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respects for judgments depends in turn upon the issuing court's absolute probity. *Judicial integrity is, in consequence, a state interest of the highest order.*

*Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J concurring) (emphasis added).<sup>9</sup>

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<sup>9</sup> While Petitioners' adjudications must be vacated based on the court's denial of their right to an impartial tribunal, juveniles who appeared without counsel or entered guilty pleas that were constitutionally infirm have a separate and equally well-settled right to vacatur of their adjudications. See *Commonwealth v Ingraham*, 316 A. 2d 77 (Pa 1974) (expressly holding that the record must disclose that the elements of the crime or crimes charged were outlined in understandable terms; the inadequacy of the colloquy led to a reversal of defendant's conviction); *Commonwealth v Cousin*, 888 A. 2d 710 (2005) (where counsel is physically absent or completely fails to offer any adversarial representation, "no showing of prejudice is necessary" to establish violation of the right to effective assistance of counsel); *U.S v. Cronin*, 466 U.S. 648 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his proceeding.")

## **II. THE DOUBLE JEOPARDY CLAUSE OF THE PENNSYLVANIA CONSTITUTION PROHIBITS RETRIAL ONCE THE ADJUDICATION OR CONSENT DECREE OF A JUVENILE IS VACATED DUE TO CERTAIN JUDICIAL OR PROSECUTORIAL MISCONDUCT**

Petitioners submit that under the Pennsylvania Constitution's double jeopardy clause, retrial is prohibited of all youth who were denied their right to counsel and/or were adjudicated delinquent upon constitutionally deficient guilty pleas starting in 2003 and ending in May 2008 once their adjudications are vacated. Ciavarella's actions in denying youth their due process rights especially when he had a pecuniary interest in the facilities in which he placed adjudicated youth rises to the level of judicial misconduct that must invoke the bar to retrial. Moreover, the repeated failure of the Luzerne County District Attorney's Office to either object to or challenge the five-year pattern and practice of due process violations in the juvenile court constituted prosecutorial misconduct such that retrial should be barred. Additionally or in the alternative, undersigned counsel argues that double jeopardy bars the re-trial of all youth who were adjudicated delinquent by, or received consent decrees from, Ciavarella during the same time period, because his conduct in accepting the bribes and not disclosing the conflict over a period of five years denied these youth a fair trial.

### **A. The Double Jeopardy Clauses of the Federal and Pennsylvania State Constitutions Apply to Juvenile Delinquency Proceedings**

The Fifth Amendment to the United States Constitution states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause was held to be applicable to the States through the Fourteenth Amendment in *Benton v. Maryland*, 395 U.S. 784, 787 (1969). The double jeopardy clause of

the Pennsylvania state constitution similarly provides that “no person shall, for the same offense, be twice put in jeopardy of life or limb.” Pa. Const. Art. I, § 10, cl. 1.

In *Breed v. Jones* an unanimous United States Supreme Court held that the double jeopardy clause applies to juvenile court proceedings in holding that the clause barred the prosecution of a juvenile as an adult for conduct that had previously resulted in a delinquency adjudication. 421 U.S. 519, 541 (1975). Pennsylvania courts also recognize that “[i]t is well settled that the constitutional prohibition against double jeopardy is applicable to juvenile proceedings.” In re: *Huff*, 582 A.2d 1093 (Pa. Super. 1990) (citing *In re R.R.*, 464 A.2d 348, 353 (Pa. Super. 1983)).

**B. Under Pennsylvania’s Double Jeopardy Clause, the Judicial Misconduct in the Instant Cases Bars Re-prosecution of Juveniles Once This Court Vacates their Adjudications or Consent Decrees**

As described in the Statement of the Case, *supra*, Ciavarella engaged in a persistent course of misconduct as a juvenile court judge from 2003 until he ceased hearing juvenile cases in May 2008. Specifically, during that time period Ciavarella: (1) received money payments from facilities in which he placed a number of the youth whom he adjudicated delinquent and failed to disclose that conflict of interest to any juvenile respondents appearing for trial before him; and (2) denied many youth their constitutional right to counsel, by failing to appoint counsel to unrepresented youth and to obtain a valid waiver of their right to counsel, as well as their right to trial, by obtaining constitutionally-infirm guilty pleas.

Petitioners respectfully submit that under the Pennsylvania Constitution’s double jeopardy clause, retrial is prohibited of all youth who were denied their right to counsel and/or were adjudicated delinquent upon constitutional deficient guilty pleas starting in 2003 to May 2008. Ciavarella’s bad faith conduct of continuing to deny youth their due process rights despite

repeated warnings is particularly egregious given his pecuniary interest in the facilities in which he placed adjudicated youth. Additionally or in the alternative, Petitioners argue that double jeopardy bars the re-trial of all youth who were adjudicated delinquent by, or received consent decrees from, Ciavarella during the same time period, because his conduct in accepting the bribes and not disclosing the conflict over a period of five years denied these youth a fair trial.

1. Judicial and/or prosecutorial overreaching and bad faith conduct that denies a youth his/her right to a fair trial bars retrial under Pennsylvania's double jeopardy clause

In *Com. v. Smith*, 615 A.2d 321 (Pa. 1992), the Pennsylvania Supreme Court held that

the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the *denial of a fair trial*.

*Smith*, 615 A.2d at 325 (emphasis added). In a highly publicized trial, defendant Smith was convicted and sentenced to death on three counts of first degree murder for killing a mother and her two young children. *Com. v. Smith*, 568 A.2d 600, 602 (Pa. 1989). Smith's conviction was reversed on appeal by the Pennsylvania Supreme Court upon a finding that the trial court erred in admitting certain hearsay testimony by associates of Smith's alleged co-conspirator. *Smith*, 568 A.2d at 605-10. On remand, Smith filed a motion to dismiss, arguing that retrial would violate double jeopardy. *Smith*, 615 A.2d at 322. On a subsequent appeal, Smith successfully argued that evidence of significant prosecutorial misconduct (namely, the prosecutor's suppression of exculpatory evidence and vigorous efforts to discredit a former police officer who testified to such, as well as the concealment of an agreement between the government and its chief witness

to seek favorable sentencing for the former) – which was discovered after trial and while his appeal was before the Pennsylvania Supreme Court – bars his re-prosecution. *Id.* at 322-23.

*Smith* departs from the United States Supreme Court’s narrower holding in *Oregon v. Kennedy*, 456 U.S. 667 (1982), interpreting the federal constitution to raise a bar to mistrial only upon a finding that the prosecutorial misconduct was intentionally aimed at provoking a mistrial. *Id.* at 324-25. The *Smith* holding relied on pre-*Kennedy* opinions issued by both the United States and Pennsylvania Supreme Courts that take a more expansive view of the circumstances invoking the double jeopardy bar to re-trial. *Id.*, citing, e.g., *United States v. Dinitz*, 424 U.S. 600 (1976); *Com. v. Starks*, 416 A.2d 498 (1980). Therefore, pre-*Kennedy* decisions inform this Court’s application of the test enunciated in *Smith* to the instant case.

This jurisprudence establishes that a finding that a judge or prosecutor has acted in bad faith to prejudice or harass a defendant invokes the bar to retrial. In *United States v. Dinitz*, the United States Supreme Court held the trial judge’s action in expelling defendant’s trial counsel did not prohibit re-prosecution under double jeopardy, since the judge was not motivated by bad faith. *Dinitz*, 424 U.S. at 611-12. However, the Court specifically noted that bad faith conduct by either a judge or a prosecutor that is intended to prejudice or harass the defendants raises the bar to retrial. *Id.* at 611. *See also Starks*, 416 A.2d at 500 (double jeopardy bars retrial where prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant as it “signals the breakdown of the integrity of the judicial proceeding.”)

Importantly for purposes of the instant case, *Smith* also expands invocation of the retrial bar beyond the mistrial context to apply to instances in which defendants successfully appeal convictions because of government misconduct. Other states, including Hawaii, *State v. Rogan*, 984 P.2d 1231 (Hawaii 1999), New Mexico, *State v. Breit*, 930 P.2d 792 (N.M. 1996), and

Arizona, *State v. Jorgenson*, 10 P.3d 1177 (Ariz. 2000), have followed Pennsylvania's lead in holding that defendants who successfully appeal convictions because of government misconduct that denied them a fair trial may not be subject to re-prosecution. Pennsylvania and its sister states recognize that it is unfair to distinguish between defendants who unsuccessfully move for mistrial and those who successfully appeal a conviction on misconduct grounds because, as in the instant case, a defendant may not uncover the egregious misconduct until after trial. *See, e.g., Smith*, 615 A.2d at 322-24.<sup>10</sup>

Pennsylvania's sister states have similarly focused on the level of egregiousness and persistence of the misconduct (as opposed to isolated instances) to determine whether the threshold that bars retrial has been met. Thus, for example, in *Breit*, 930 P.2d at 795, the New Mexico Supreme Court held that double jeopardy barred the re-trial of defendant on aggravated assault and first degree murder charges after his motion for a new trial was granted based on "extreme prosecutorial misconduct." In that case, the trial court repeatedly warned the prosecuting attorney about his outrageous and highly prejudicial misconduct, to no avail. *Id.* at 805-06 and Appendix. The New Mexico Supreme Court held that double jeopardy prohibits a retrial

when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial *or acts in willful disregard of the resulting mistrial, retrial or reversal.*

*Breit*, 930 P.2d at 803 (emphasis added). *See also Rogan*, 984 P.2d at 1239-1241, 1249 (holding that retrial was barred when defendant successfully appealed conviction on the grounds that

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<sup>10</sup> It should be noted that had any of the juvenile respondents been made aware of Ciavarella's financial dealings with the placement facilities and his failure to disclose the conflict at the time of their trials, they would have had more than adequate grounds to move for a mistrial. *See, e.g., Office of Disciplinary Counsel v. Anonymous Attorney A.*, 595 A.2d 42, 48 (Pa. 1991).

prosecutor made inflammatory racial references in closing argument; courts had long prohibited racially biased prosecutorial arguments and prosecutor's egregious conduct deprived defendant of a fair trial.)

2. Ciavarella's persistent and bad faith pattern and practice of violating youths' due process rights in willful disregard that these acts could result in reversal of their adjudications raises a bar to re-prosecution; such conduct is particularly egregious in light of his undisclosed pecuniary interest which created an untenable conflict of interest in presiding over these youths' cases

The double jeopardy bars retrial of any youth who were denied their right to counsel, or were adjudicated delinquent upon constitutionally deficient guilty pleas. The Pennsylvania Supreme Court has noted that the type of overreaching to which double jeopardy applies is that which shows an intent to “deprive [individuals] of a fair trial; to ignore the bounds of legitimate advocacy; in short, *to win a conviction by any means necessary.*” *Com. v. Martorano*, 741 A.2d 1221, 1223 (Pa. 1999) (emphasis added). Ciavarella's actions in persistently denying youth their right to counsel and their right to a fair trial by accepting guilty pleas that were not voluntary, knowing and intelligent, even after Ciavarella's rulings were reversed precisely because of these unconstitutional practices, evinced an intent that the juveniles be adjudicated delinquent “by any means necessary.” Such tactics are specifically designed to “demean or subvert the truth-seeking process.” *Com. v. Chmiel*, 777 A.2d 459, 464 (Pa. Super. 2001) (internal citation omitted). *See also Smith*, 615 A.2d at 322-23 (describing the prosecution's misconduct as an effort to subvert the truth-determining process). These acts were particularly pernicious when viewed against the backdrop of Ciavarella's undisclosed pecuniary interest in facilities in which he placed adjudicated youth.

The jurisprudence barring retrial has developed mainly within the context of prosecutorial misconduct. *See discussion in Part II.B.1 supra*. Nevertheless, the Pennsylvania Supreme Court has specifically held that any number of scenarios of misconduct that deprive a defendant of his constitutional right to a fair trial may bar re-prosecution under the Pennsylvania Constitution. *See Martorano*, 741 A.2d at 1223. *See also Dinitz*, 424 U.S. at 611 (noting that the double jeopardy clause bars retrial where bad faith conduct by *judge* or prosecutor threatens the harassment of an accused by successive prosecutions or declarations of mistrial) (emphasis added); *United States v. Jorn*, 400 U.S. 470, 485 (1971) (“where circumstances develop not attributable to prosecutorial or *judicial* overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-prosecution...”) (emphasis added) The same factors that weigh in favor of raising the bar to retrial in cases of prosecutorial misconduct apply in the context of judicial misconduct.

For example, courts have recognized that the double jeopardy clause acts as one of the few external checks on the state’s power and near unaccountability in the context of criminal prosecutions, and thus curbs potential abuses of that power. *See, e.g., Starks*, 416 A.2d at 500 (noting that double jeopardy was designed to protect against overreaching). Courts have noted the enormous power and resources of the state in the context of criminal prosecutions. *Green v. United States*, 355 U.S. 184, 187-88 (1957). As one commentator has noted

prosecutors wield great discretion and power “in the decision to charge and what to charge; in the control of vast governmental resources in investigation and preparing a case; in the plea bargaining process for the majority of cases that are resolved without trial; and in the deference and authority the prosecution commands before juries in those cases that are tried to conclusion.

Kenneth Rosenthal, *Prosecutor Misconduct, Convictions and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998). Juvenile court judges similarly

wield enormous power, and there are limited means to check potential abuses of that power. Juvenile court judges are employees and representatives of the Commonwealth of Pennsylvania, and the Court of Common Pleas, in which the juvenile court resides, is part of the Pennsylvania United Judicial System. Pa. Const., Art. V, §§ 1, 10. As this Court has noted, “[t]he property, well-being, and sometimes the freedom of litigants are in the hands of judges... The power of a judge is enormous, and concomitantly, no position in our society demands higher standards.” *Judicial Inquiry and Review Board v. Fink*, 532 A.2d 358, 367, 373 (Pa. 1987). The juvenile court judge in particular exercises great power as he or she acts as both judge and jury in adjudicatory hearings. Notably, as described in the Statement of the Case, *supra*, Ciavarella did not respond to the few mechanisms in place to curb judicial overreaching, as he failed to correct the due process violations in his courtroom after several successful challenges.

In determining whether double jeopardy bars retrial, the court must balance the individuals’ double jeopardy rights against society’s interest in maintaining justice and punishing criminal conduct so as to deter crime and protect the public. *Kennedy*, 456 U.S. at 670-72; *Jorn*, 400 U.S. at 479-481. Effective enforcement of society’s criminal laws requires that those who have committed crimes be held accountable and punished. *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) (citing *United States v. Tateo*, 377 U.S. 463, 466 (1964)). Application of this balancing test to the instant case leads to the conclusion that retrial of these youth should be barred. Upon information and belief, most juveniles who were adjudicated by Ciavarella from 2003 through May 2008 have completed their court-ordered dispositions, including performing community service, paying restitution to their victims, and participating in other restorative justice activities, as well as participating in other rehabilitative and treatment services arranged by the juvenile court. Thus, society’s interest in ensuring that these youth are provided “programs of

supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community,” Pennsylvania’s Juvenile Act, 42 Pa.C.S.A. § 6301, have been served. A bar to retrial after these youths’ adjudications have been vacated would in no way undercut society’s interest in these goals given that their dispositions have been completed. *See Tateo*, 377 U.S. at 466 (noting that a defendant’s right to a fair trial is balanced against the societal interest in *punishing* those who have committed crimes) (emphasis added).<sup>11</sup> Barring retrial, however, would send a clear message that the egregious conduct of the former juvenile court judge can never be tolerated.<sup>12</sup>

Other key policy concerns underlying the double jeopardy clause include protecting a defendant from the hardship of multiple trials for the same offense. *See Jorn*, 400 U.S. at 479, quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957) (“[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity... .”); *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978) (noting that a second prosecution “increases the financial and emotional burden on the accused, and prolongs the period” of stigmatization.) Another is preserving the

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<sup>11</sup> Double jeopardy also protects defendants and juvenile respondents from being punished twice for the same offense. *United States v. Wilson*, 420 U.S. 332, 342-43 (1975); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). In most instances, the juveniles who went before Ciavarella have completed their court-ordered dispositions and very few are still under juvenile court jurisdiction. Thus, even if the youth whose adjudications or consent decrees are vacated by order of the Special Master are re-tried for the same offenses, the double jeopardy clause prohibits those youth from being subjected to a second juvenile court disposition.

<sup>12</sup> Notably, the cases cited in Part II.b.1 *supra* never factored the severity of the offense into the calculus of determining whether there is a bar to retrial. Indeed, the cases in which retrial barred involve the most serious crimes. Juvenile respondents who appeared from 2003-2008 were, for the most part, adjudicated of offenses far less serious.

finality of judgments such that defendants can resume their lives without fear of re-adjudication. *Jorn*, 400 U.S. at 486 (noting “the importance to the defendant of being able, once and for all, to conclude his confrontation with society...”). These policy concerns, emerging from cases involving adult defendants, have even greater force in the instant case as it involves juvenile respondents who are transitioning into adulthood.

For several years, Ciavarella engaged in a pattern and practice of violating well-settled law with regard to youths’ due process rights. That youth have a constitutional right to counsel in delinquency proceedings is long established in our jurisprudence. More than forty years ago the United States Supreme Court held in *In re Gault*, 387 U.S.1, 41 (1987), that the Due Process Clause of the Fourteenth Amendment guarantees youth charged with delinquency a constitutionally protected right to counsel. *Gault* recognized that attorneys are needed in the juvenile justice system to assist clients to “cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client]... has a defense and to prepare and submit it.” 387 U.S. at 36. Consistent with *Gault*, Pennsylvania’s General Assembly established that the right to counsel extends to juveniles through all stages of the juvenile delinquency process (*e.g.*, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal). 42 Pa.C.S.A. § 6337 (“a party is entitled to representation by legal counsel at all stages of any proceedings under [the Juvenile Act].”) An admission – which is the juvenile equivalent of a guilty plea – is a critical stage at which a respondent must be afforded the right to counsel. *See Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (citing *Williams v. Kaiser*, 323 U.S. 471, 475 (1945)); *Com. v. Sheehan*, 285 A.2d 465, 469-70 (Pa. 1971) (citations omitted); *Com. v. Ritchey*, 245 A.2d 446, 448-49 (Pa. 1968) (citations omitted); *Com. v. Cavell*, 222 A.2d 722, 723-24 (Pa. 1966) (citations omitted);

*Com. v. Barrows*, 534, 242 A.2d 925, 926 (Pa. Super. 1968) (citations omitted). An accused entering an admission to an offense *must* first be counseled by an attorney, absent a voluntary, knowing and intelligent waiver of counsel. *Santobello v. New York*, 404 U.S. 257, 261 (1971) (citing *Moore v. Michigan*, 355 U.S. 155 (1957)) (emphasis added).

Concern about delinquency hearings proceeding without counsel for the child led this Court to require, effective October 1, 2005, that juvenile courts conduct an extensive colloquy to determine a juvenile's comprehension of the consequences of waiver. Pa.R.J.C.P. No. 152. But long before the adoption of the juvenile court rules, this Court recognized that

While an accused may waive his constitutional right, such a waiver must be the free and unconstrained choice of its maker and also must be made knowingly and intelligently. To be a knowing and intelligent waiver defendant must be aware of both the right and of the risks of forfeiting that right. Furthermore, the presumption must always be against the waiver of a constitutional right. Nor can waiver be presumed where the record is silent. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.

*Com. v. Monica*, 597 A.2d 600, 603 (Pa. 1991) (citations and internal quotations omitted).

It is also another well-settled principle of constitutional law that admissions from juveniles must be voluntary, knowing, and intelligent. *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). For an admission to be valid, the child must be informed, at a minimum, of all of his rights and the rights he is forgoing by pleading guilty and the possible dispositions that the court could impose if he enters an admission. *Boykin*, 395 U.S. at 243; *Com. v. Hallock*, 722 A.2d 180, 182 (Pa. Super. 1998) (citing *Com. v. Young*, 695 A.2d 414, 417 (Pa. Super. 1997)). Due process also requires that the court give the child adequate notice of the nature and elements of the offense to which the child

is making an admission. *Henderson*, 426 U.S. at 646-47. An admission cannot be considered voluntary unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). *See also Com. v. Hines*, 437 A.2d 1180, 1181-84 (Pa. 1981) (holding that 15-year-old's guilty plea was constitutionally invalid where court's colloquy failed to establish that youth understood the nature and elements of the offenses with which he was charged, including an explanation of the law in terms of the facts of the case, and did not establish a factual predicate for the plea). Moreover, the Constitution requires the court to determine if there is, in fact, a factual basis for the admission before accepting it. *Com. v. Martinez*, 453 A.2d 940, 942-44 (Pa. 1982); *Hines*, 437 A.2d at 1182-84 (citations omitted); *Hallock*, 722 A.2d at 182 (citing *Young*, 695 A.2d at 417). "[M]anifest injustice" occurs if an admission is entered by a respondent who lacks full knowledge and understanding of the charge against him. *Com. v. Schultz*, 477 A.2d 1328, 1330 (1984) (citation omitted). And the waiver of constitutional rights can never be presumed from a silent record. *Boykin*, 395 U.S. at 242 (citation omitted). *See also Hines*, 437 A.2d at 1182 (citing *Boykin*, 395 U.S. at 243 n.5) (noting that for a plea to be constitutionally valid, the respondent's admission must be an "intentional relinquishment or abandonment of a known right or privilege.") The Pennsylvania Rules of Juvenile Court Procedure also require the court to administer a colloquy prior to accepting an admission, to ensure that the admission is made voluntarily and knowingly. Pa.R.J.C.P. No. 407.

As described *supra*, Ciavarella was repeatedly reminded that his practices in allowing youth to proceed without counsel and without a valid waiver of counsel, and of taking admissions that were neither voluntary nor knowing and intelligent as the bases of adjudications, violated the United States Constitution, the Pennsylvania state constitution, Pennsylvania's

Juvenile Act and the Pennsylvania Rules of Juvenile Court Procedure. Indeed, after the Superior Court's ruling in A.M., Ciavarella vowed never to do it again. But he did. The cases described in the Statement of the Case *supra*, the findings of the Special Master, as well as the allegations in the four lawsuits currently pending in the U.S. District Court for the Middle District of Pennsylvania<sup>13</sup>, demonstrate that Ciavarella systematically violated youths' most fundamental rights. That he committed these violations when he had an undisclosed conflict of interest due to financial pay-offs from juvenile facilities makes the conduct even more egregious.

Ciavarella's unprecedented misconduct evinced an intent that the juveniles be adjudicated delinquent "by any means necessary," *Martorano*, 741 A.2d at 1223, and was undertaken in "willful disregard of the resulting mistrial, retrial or reversal." *Breit*, 930 P.2d at 803. Consequently, these youth were denied a fair trial and double jeopardy bars their retrial once their adjudications or consent decrees are vacated.

3. Retrial is barred in the instant case because Ciavarella's financial dealings with the placement facilities and his failure to disclose the conflict was so egregious that all juveniles who appeared before Ciavarella were denied their rights to a fair trial

Additionally or in the alternative, Petitioners contend that double jeopardy bars the retrial of all youth who were adjudicated delinquent by, or received consent decrees from, Ciavarella during the same time period, because his conduct in accepting the bribes and not disclosing the conflict over a period of five years denied these youth a fair trial.

The Pennsylvania Constitution clearly mandates that

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<sup>13</sup> See *H.T. et al. v. Ciavarella et al.*, No. 09-cv-357 (M.D. Pa.); *B.W. et al. v. Powell et al.*, No. 09-cv-286 (M.D. Pa.); *Conway v. Conahan*, No. 09-cv-291 (M.D. Pa.); and *Humanik v. Ciavarella et al.*, No. 09-cv-630 (M.D. Pa.) (now consolidated for discovery purposes under No. 09-cv-286). The complaints filed in these federal lawsuits describe hundreds of cases in which Ciavarella violated youths' due process rights.

(b) Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court.

(c) No justice, judge or justice of the peace shall be paid or accept for he performance of any judicial duty or for any service connected with his office, any fee, emolument or perquisite other than the salary and expenses provided by law.

Pa. Const. Art. V, § 17. The Pennsylvania Code of Judicial Conduct in turn states that

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

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(c) they know that they, individually or as a fiduciary, or their spouse or minor child residing in their household, have a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding...

Code of Jud. Conduct, Canon 3(c) (2009). This Court has held that recusal is required wherever there is a substantial doubt as to the jurist's ability to preside impartially. *McFall*, 617 A.2d at 713 (citations omitted).

In the instant case, Ciavarella knew that his failure to recuse himself from the trials of these juveniles when he had accepted payments from some of the same facilities to which he placed them was an untenable conflict of interest. Ciavarella also knew that as a matter of law, such egregious conflict was certain grounds for reversal of the youth's adjudications, *see McFall*, *supra*, and continued to preside over these cases in willful disregard of that fact. For that reason, these youth should not be re-prosecuted.<sup>14</sup>

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<sup>14</sup> In *McFall*, this Court remanded all the cases for new trials after vacating the delinquency adjudications and criminal convictions. 617 A.2d at 714. It should be noted that appellants in *McFall* sought new trials, 617 A.2d at 710, and there is nothing in the record that suggests that once remanded, the parties filed motions with the trial court to dismiss on double jeopardy grounds.

**C. Double Jeopardy bars retrial of Petitioners' cases once Special Master vacates the adjudications and consent decrees due to prosecutorial misconduct; the district attorney failed to raise objections or report the persistent violations of due process in Ciavarella's courtroom**

Additionally or in the alternative, the repeated failure of the Luzerne County District Attorney's Office to either object to or challenge the five-year pattern and practice of due process violations in the juvenile court constituted prosecutorial misconduct such that retrial should be barred.<sup>15</sup>

"In advocating the cause for [the] Commonwealth, prosecutors are to seek justice, not only convictions." *Com. v. Cherry*, 378 A.2d 800, 803 (Pa. 1977) (citations omitted). A prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a particular and very definite sense the servant of the law... .

*Berger v. United States*, 295 U.S. 78, 88 (1935). *See also ABA Standards For Criminal Justice*, The Prosecution Function. Standard 3-1.2(c) (3d ed. 1993) ("ABA Prosecution Function Standard) (stating that "[t]he duty of the prosecutor is to seek justice, not merely to convict").

Moreover,

the prosecutor must assume the role of guardian against injustice and corruption. It is unacceptable to turn a deaf ear to suspicions of misconduct. [There is] a duty on the prosecutor to follow through when there is reasonable suspicion of misconduct by a member of the judiciary. When judicial scandals are uncovered, they become an indictment of the entire criminal justice system, creating a public perception that all those involved in the system are corrupt. Because of

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<sup>15</sup> Undersigned counsel are in no way stating or implying that the district attorney's office had knowledge or suspicion of the former judges' financial conflicts.

the prosecutor's close contact with the judiciary, he has the best opportunity to observe suspicious patterns of behavior. Because of the prosecutor's role in the criminal justice system, he has the obligation to investigate and address the misconduct with at least the vigor and resources of any other allegations of corruption within the jurisdiction.

National District Attorneys Ass'n, NATIONAL PROSECUTION STANDARDS 85 (2<sup>nd</sup> ed. 1991). *See also* ABA Prosecution Function Standard 3-1.2(d) ("When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.")

As described in Part II.B.2, *supra*, the law with regard to youths' due process rights is well established. The district attorney had a duty to object to, or at least report to outside authorities, Ciavarella's consistent denial of their rights. In standing silent as the court allowed youth to proceed without counsel and adjudicated them on the basis of constitutionally deficient admissions, the prosecutors evinced an intent that the juveniles be adjudicated delinquent "by any means necessary," *Martorano*, 741 A.2d at 1223, and acted in "willful disregard of the resulting mistrial, retrial or reversal." *Breit*, 930 P.2d at 803. As the Pennsylvania Supreme Court has noted, "a fair trial is not simply a lofty goal, it is a constitutional mandate... and where that constitutional mandate is ignored and subverted by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity." *Martorano*, 741 A.2d at 1223 (internal quotations and citations omitted). For at least five years, the Luzerne County District Attorney's Office turned a blind eye to the improprieties in Ciavarella's courtroom and, therefore, it should be denied an opportunity to re-prosecute those youth whose rights were violated.

## CONCLUSION

WHEREFORE, for the foregoing reasons and any other reasons that may appear to this Court, Petitioners respectfully request that the Court order that the adjudications and consent decrees of all juveniles who appeared before Ciavarella between 2003 and May 2008 be vacated and expunged, and that the Court further order that the re-trial of all such juveniles is barred.

Respectfully submitted,

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DATED: June 9, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on June 9, 2009 I served by U.S. Postal Service (first class) this Brief on the following parties, which service satisfies the requirements of Rules 121 and 122 of the Pennsylvania Rules of Appellate Procedure:

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