

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 81 MM 2008

IN RE J.V.R.; H.T., A MINOR THROUGH HER MOTHER, L.T; ON BEHALF OF
THEMSELVES AND OTHER SIMILARLY SITUATED YOUTH

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA

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STATEMENT OF THE CASE

This Court is presented with the opportunity to do justice or to undertake the same rush to judgment that it seeks to remedy. The Petitioners have asked the court to eradicate every ingredient of an admittedly sick and sickening episode of judicial corruption by ignoring the criminal behavior that brought them into harms' way. The Commonwealth in opposing the scope of relief Petitioners seek is not even remotely condoning or excusing the conduct that necessitates these proceedings. Nevertheless, the Commonwealth is in no way implicated in the conduct for which judicial officers have been criminally charged. Furthermore, the Commonwealth has constitutional and statutory obligations to victims of the juveniles' criminal behavior, and must ensure that the remedy obtained in these proceedings is not precipitated by inflammatory characterizations and unsubstantiated accusations in court filings, but represents an appropriate measure by the courts for conduct of those under its supervision.

Judge Mark A. Ciavarella, Jr. presided over juvenile court in Luzerne County from 1999 to May of 2008; he also served as the President Judge of the Luzerne County Court of Common Pleas for much of the same time period. During this time, Ciavarella presided over thousands of juvenile proceedings, hundreds of which involved violent juvenile offenders who violently and/or sexually assaulted their victims. For example:

- J.C., Luzerne County Docket No. 36540. In 2007, J.C. was adjudicated delinquent of indecent assault, burglary, criminal trespass, and criminal mischief. J.C. was found to have committed sexual acts upon a younger family member. J.C. idolized Adolf Hitler and drew doodles showing himself committing murders. J.C. was represented

by counsel at his adjudication of indecent assault, and waived his right to counsel for the other charges.

- E.E., Luzerne County Docket No. 33235. E.E. was adjudicated delinquent of two counts of open lewdness based on sexual acts he admitted committing against children aged five and six.
- D.F., Luzerne County Docket No. 35156. In 2005, D.F. was adjudicated delinquent of arson, criminal mischief, and recklessly endangering another person. In 2008, he was adjudicated delinquent again by a different Luzerne County judge; this time, he was adjudicated delinquent of two counts of simple assault and two counts of aggravated assault for bludgeoning another teenager with a metal pipe. D.F. was represented by counsel at all of his juvenile proceedings.
- J.F., Luzerne County Docket No. 35479. In 2005, J.F. was adjudicated delinquent of attempted indecent assault. In 2006, he was adjudicated delinquent of rape and involuntary deviate sexual intercourse. J.F. was represented by counsel from the Luzerne County Public Defender's Office in both cases.
- D.H., Luzerne County Docket No. 35456. D.H. was adjudicated delinquent on four occasions based on separate incidents of disorderly conduct and false alarms. Since being placed in custody, D.H. has repeatedly been placed in restraints and has proven to be destructive and unstable.

Unknown to the public, and to the Luzerne County District Attorney's Office, Ciavarella received unreported, improper, unethical and now admittedly illegal payments from a corporation known as PA Child Care, which owned and operated a facility for the detention of juvenile offenders. In his capacity as judge in juvenile court, Ciavarella ordered that juveniles be

sent to PA Child Care as part of their dispositions. He never disclosed his financial interests in that corporation to the juveniles, the Commonwealth, or the public at large.

Ciavarella's financial interests in PA Child Care, and the inappropriateness of his actions, became known after he and his co-conspirator, former Judge Michael T. Conahan, were indicted on and pleaded guilty to federal criminal charges on January 26, 2009. Since then, the Supreme Court of Pennsylvania has taken steps including the appointment of a Special Master to review juvenile matters handled by Ciavarella and to "identify the affected juveniles and rectify the situation as fairly and swiftly as possible." 81 MM 2008, Order dated 2/11/2009. At issue are the rights of juveniles who appeared before Ciavarella in his capacity as the presiding judge in Luzerne County's Juvenile Court. Juvenile proceedings that took place before other Luzerne County judges are not at issue.

The record in this matter consists of a handful of affidavits and court papers filed in habeas corpus actions or appeals on behalf of individual juveniles. The Special Master has not yet had any opportunity to conduct any hearings or take any testimony. Respondent has participated in proceedings prior to the instant one (in cooperating with counsel for juveniles where appropriate to obtain supersedeas relief, reversals, releases or retrials) and before the Special Master in good faith to support the juveniles' constitutional rights and more recently to comply with the Court's goal of rectifying the situation. The Commonwealth of Pennsylvania and its representatives were not implicated in any of the criminal conduct of Judge Ciavarella giving rise to these proceedings. Neither the Petitioners nor the U.S. Attorney has ever alleged that the District Attorney, any individual attorney in the District Attorney's office, or any member of law enforcement conspired with the judge to deny constitutional rights. Petitioners have not alleged that they were wrongfully accused or that the charges against them were

inflated. Furthermore, they are not alleging that the District Attorney withheld or manufactured evidence. Even though there is not a shred of evidence of any misconduct on the part of the District Attorney, it is now apparent that, because Petitioners perceive that the District Attorney did not jump and has not jumped on the Juvenile Law Center's bandwagon,¹ counsel makes serious, outlandish and unsubstantiated allegations of prosecutorial misconduct.

These allegations have no support in the record before this Court, or in any filings in this or the federal criminal cases. Moreover, there is not a single legal authority to support the contention that the District Attorney has the kind of wide-ranging and unbridled constitutional duty to control, supervise or remedy the actions of judges that is asserted here. Finally, Petitioners themselves are estopped from seeking a bar to re prosecution because they have previously represented to the Court that the District Attorney supported their constitutional rights.

Finally, this Court must be mindful that counsel for Petitioners wears two hats. Not only has counsel petitioned the body responsible for supervising the conduct of the judiciary and asked the Supreme Court directly to correct what has become clear in retrospect a substantial miscarriage of justice, but counsel is also posturing this matter to further the interests of the affected individuals in obtaining monetary damages in civil proceedings where other parties are being asked to compensate them for the losses they are alleged to have incurred. Any remedy that wholly erases each and every component of the criminal proceedings could potentially

¹ Petitioners took direct aim at the District Attorney in their Application for Leave to File a Response to the District Attorney's opposition to their application for Supreme Court to accept jurisdiction of their Petition, accusing the District Attorney of "trivializ[ing] the systemic breakdown of the rule of law in Luzerne County." (Application, p. 1). In that Application, as here, Petitioners made widespread use of newspaper accounts, suggesting that such nonevidentiary materials should be judicially noticed.

impair the rights of parties who are unrepresented in this proceeding and therefore are unable to defend against these claims.

The Commonwealth of Pennsylvania now submits the present brief in response to the Special Master's Order of May 28, 2009.

SUMMARY OF THE ARGUMENT

The Commonwealth of Pennsylvania does not dispute that improper conduct by the trial judge creates at least an appearance of impropriety that requires the grant of new proceedings to the Petitioners. However, double jeopardy principles do not require the relief sought by the Petitioners. The misconduct of the judge does not warrant the complete discharge of the Petitioners; in other cases, the grant of new proceedings has been the only relief available to similarly situated petitioners.

There was no prosecutorial misconduct by the Luzerne County District Attorney's Office. The Juvenile Law Center's claims that prosecutorial misconduct took place and requires the Petitioners' discharge are utterly baseless and must be denied. This Court must decline to participate in Petitioners' continuing efforts to sensationalize and inflame these proceedings. The record contains no facts to suggest even a hint of prosecutorial misconduct, and the Petitioners' position must be rejected.

ARGUMENT

I. **NO PARTY TO THESE PROCEEDINGS CAN COUNTENANCE JUDGE CIAVARELLA'S IMPROPER CONDUCT AND FINANCIAL INTERESTS OR DISPUTE THAT SUCH CONDUCT, UNDER MCFALL, REQUIRES THE GRANT OF NEW PROCEEDINGS.**

The Petitioners argue that Judge Ciavarella should have been disqualified from presiding over their juvenile proceedings because of his secret financial dealings that gave him a personal interest in the outcome. Because Ciavarella's conduct casts substantial doubt over his impartiality and his ability to preside fairly over the matters in question, the Commonwealth of Pennsylvania agrees that the results of those proceedings should be vacated, and Petitioners should receive the fair hearing to which they were entitled from the outset.

As the Petitioners argue, the question of whether Ciavarella properly presided over these matters is governed by the Pennsylvania Supreme Court's decision in In the Interest of McFall, 617 A.2d 707 (Pa. 1992). In that case, the Supreme Court considered a Philadelphia trial court judge's cooperation with the FBI regarding an investigation into judicial corruption, and the effect of the cooperation on criminal and juvenile matters before the judge. The Court found that criminal defendants who appeared before the judge during the investigation were entitled to new proceedings.

The Supreme Court held, "In order for the integrity of the judiciary to be compromised, ... a judge's behavior is not required to rise to a level of actual prejudice, but the appearance of impropriety is sufficient." Id. at 712. "A jurist's impartiality is called into question whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter." Id. at 713. The Court was not required to "find actual prejudice, but rather, the

The benchmark for this Court is McFall, the only cited decision that involves both an undisclosed disqualifying interest and criminal conduct. In both McFall and this proceeding, the judge's improper interests infected the fairness of the proceedings. The Supreme Court in McFall determined that the appropriate remedy for the denial of a fair proceeding is to provide the accused with what was previously denied: a fair hearing. McFall does not support a broader remedy than the grant of new proceedings, and the other authorities relied upon by Petitioners do not involve sufficiently similar facts to expand the remedy that arises under a McFall-type challenge. Here, this Court has already inferred broader relief by invoking the expungement procedure, which would erase the record pending further relief.

The exhibits attached to the instant application and Petitioners' previous submissions demonstrate a wide divergence of facts relating to the underlying proceedings. Some Petitioners were represented by counsel. Some Petitioners were admittedly informed about the right to counsel and even discussed representation with private counsel, who advised them that such an investment was not warranted or necessary. Other Petitioners executed written waivers but did not have a colloquy with the court on the record concerning the waiver. Many of the Petitioners were not sentenced to detention at any facility in which the judge had a financial interest. Each of these differences demonstrates why a bar to re prosecution based on judicial disqualification is an inappropriate remedy. To the contrary, McFall makes clear that a double jeopardy bar cannot arise out of judicial disqualification.

Petitioners fail to provide any factual basis or legal authority to support their double jeopardy argument that all of the Petitioners are entitled to discharge and expungement of their records. Instead, the appropriate remedy is the grant of new proceedings before a jurist whose fairness and impartiality are not in doubt. In McFall, the Supreme Court did not order that the

juveniles and other defendants be discharged; instead, the Court ordered that new proceedings be held. McFall, 627 A.2d at 714. Discharging the defendants and expunging their records appears not to have even been considered as a remedy. There is no reason why the present cases should be treated any differently.

III. THE PETITIONERS ARE NOT ENTITLED TO COMPLETE DISCHARGE ON THE BASIS OF DOUBLE JEOPARDY PRINCIPLES IN THE ABSENCE OF EVIDENCE OF EXTREME PROSECUTORIAL MISCONDUCT AMOUNTING TO A VIOLATION OF DUE PROCESS.

The Petitioners further claim entitlement to eradicate their criminal actions by virtue of the conduct of the Commonwealth in the proceedings before Judge Ciavarella. Although they do not charge the Commonwealth with participating in any of the criminal activity or even any awareness of it, the Petitioners allege that prosecutorial misconduct took place and that their discharge is the appropriate remedy. There has been no such misconduct, and the Luzerne County District Attorney's Office vehemently denies any such allegations. The courts have set forth the standards of conduct with which prosecutors must comply, and the District Attorney's Office has always faithfully followed these standards.

The courts have set forth principally two types of prosecutorial overreaching. The first is misconduct designed to provoke a mistrial in order to secure a second, and perhaps more favorable, opportunity to convict the defendant. Commonwealth v. Miele, 446 A.2d 298 (Pa. Super. 1982). The second is the misconduct undertaken in bad faith to prejudice or harass the defendant. Id. It has not even been alleged that either of these two types of misconduct took place in the Petitioners' matters. Nothing in the Petitioners' arguments can possibly support a finding that either type of prosecutorial misconduct took place. This Court therefore has no grounds to find any misconduct.

The absence of prosecutorial misconduct is especially obvious when this Court considers the true cause of any wrongdoing: the former judge. It is inconceivable that prosecutorial misconduct can be found in a case where the judge, and not the District Attorney's Office, is the party who acted illegally.

In general, defendants are not entitled to discharge after judgments of sentence are reversed. The voluntary act of seeking and receiving a new trial constitutes a waiver of claims that double jeopardy prohibits retrial. Commonwealth v. Constant, 925 A.2d 810 (Pa. Super. 2007).

Double jeopardy may apply to prevent retrial in cases of exceptional prosecutorial misconduct. In Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992), the Pennsylvania Supreme Court set forth the standards for determining when retrial is so precluded. In Smith, prosecutors denied the existence of exculpatory evidence, failed to disclose the evidence to the defense after discovering it, and accused a witness who described the evidence of perjury. The Supreme Court reversed the judgment of sentence based on these actions. The defendant then filed a motion to preclude a new trial based on double jeopardy principles, which the trial court denied.

The Supreme Court held that the defendant could not be retried. "[The Double Jeopardy Clause] bars retrials where 'bad faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." Smith, 615 A.2d at 324, quoting U.S. v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 1075 (1976). In the present matter, on the other hand, the Commonwealth certainly did not afford itself more favorable opportunities in the Petitioners' cases to obtain favorable judgments; to the contrary, if

new proceedings are granted, the Commonwealth will likely find it difficult to have many of the Petitioners adjudicated delinquent due to the passage of time.

"[T]he 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 a 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." *Id.* at 325.

Indeed, courts have been reluctant to order defendants discharged in cases where prosecutorial misconduct is alleged. The courts have not prohibited retrial in all cases of intentional prosecutorial overreaching. Commonwealth v. Chmiel, 777 A.2d 459 (Pa. Super. 2001). Review of these double jeopardy claims is primarily concerned with prosecutorial tactics actually designed to demean or subvert the truth-seeking process. *Id.* Discharge under double jeopardy principles is reserved for cases involving the misrepresentation and/or withholding of evidence by the prosecution so as to obtain an unfair verdict and hamper the defendant's ability to present a defense. Commonwealth v. Basemore, 875 A.2d 350 (Pa. Super. 2005). Cases in which defendants are discharged are limited to those cases where extreme prosecutorial misconduct coupled with weak evidence make it impossible for a jury to reach a fair verdict. *Id.*

The Petitioners are correct in asserting the general rule that double jeopardy principles apply to juvenile delinquency proceedings. Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975); In Interest of R.R., 464 A.2d 348 (Pa. Super. 1983). However, the Commonwealth disagrees with the Petitioners' conclusion that double jeopardy principles entitle them to discharge. The Commonwealth denies that any prosecutorial misconduct was committed in the cases at hand, and, in the alternative, submits that a finding of misconduct would not require the complete discharge of the juveniles on double jeopardy grounds.

The attorneys for the Commonwealth absolutely did not in any way commit prosecutorial misconduct, and the Juvenile Law Center's argument to the contrary is without any basis in fact whatsoever. It was Ciavarella alone who operated criminally and under the cloud of a financial conflict of interest rendering him unable to fairly adjudicate juvenile cases. Certainly, no one affiliated with the Luzerne County District Attorney's Office was aware of the judge's criminal activities and the resulting conflict of interest at the times of the Petitioners' hearings; only since public disclosures of the judge's wrongful actions were made has such information become available, and as such the Commonwealth joins the Petitioners in their request for new hearings in cases handled by Ciavarella based on this newly available information. The Commonwealth cannot be found responsible for any wrongful actions by the judge, especially where the judge concealed his criminality from the Commonwealth's representatives as he did from the public at large.

The absence of prosecutorial misconduct is especially apparent in light of the procedures that existed in Luzerne County which gave notice to juveniles of their right to counsel. Prior to a juvenile adjudication hearing, a juvenile and his or her parent or guardian would be informed on several separate occasions of his or her right to counsel. Notice of the right to counsel was provided to juveniles and their parents or guardians by the Luzerne County Juvenile Probation Department as a standard matter of procedure. The notice that juveniles received of their intake hearing was mailed to them and notified them that they could obtain counsel. Juveniles were, as a matter of course, verbally advised of their right to counsel by the probation officer at the intake hearing. Later, the summons to appear before the judge would also advise the juveniles of their

right to counsel. Finally, when a juvenile arrived at the court for an adjudication hearing, he or she was given a form before entering the courtroom which referred to his or her right to counsel².

Given the above information, it is impossible to say that the prosecutors acted to deprive juveniles of their right to counsel. The prosecutors knew of the above procedures and therefore believed that the juveniles appearing in Ciavarella's courtroom knew they had a right to counsel. The prosecutors cannot be found to have committed misconduct for not stepping forward to inform juveniles of rights which the prosecutors believed the juveniles were already aware of.

The judge's failure to give legally required colloquies does not constitute misconduct by the Commonwealth and cannot require the Petitioners' discharge. The courts of Pennsylvania have never found the absence of a colloquy to be attributable to the Commonwealth rather than the court. More importantly, there have been no cases in which the absence of a colloquy has led to a defendant being discharged; instead, courts have consistently found that a new trial or hearing is the appropriate remedy. *See, e.g., Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997) (new trial ordered where no colloquy conducted regarding waiver of right to counsel); *In re A.M.*, 766 A.2d 1263 (Pa. Super. 2001) (new proceedings ordered for juvenile who was not informed of right to counsel); *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. Super. 1991) (remand for further proceedings following determination that guilty plea colloquy was inadequate).

As a review of these cases show, there is nothing novel about a judge's failure to conduct a proper colloquy; there have been many such cases. That the appropriate remedy is the grant of

² Testimony regarding the procedures described above was elicited in a juvenile habeas corpus proceeding in *In re M.Y.*, Luzerne County Juvenile Docket No. 086 of 2008. Undersigned counsel has attempted to obtain a transcript of that proceeding, but has been unable to do so because of the court reporter's unavailability. Undersigned counsel requests permission to supplement the record to include a copy of that transcript when it becomes available, which is anticipated to take place before the scheduled oral argument in this matter on July 17, 2009.

new proceedings is so well-settled that there do not appear to be any cases in which defendants have even requested, let alone received, the drastic relief sought here. The only way in which this case differs from others in the large number of cases that are now before this Court in a single proceeding. That fact does not change the underlying principle that discharge of the Petitioners is not appropriate.

Furthermore, even if prosecutorial misconduct were present, which it most certainly was not, discharge would not be an appropriate remedy. Not every instance of prosecutorial misconduct requires a finding that retrial would violate double jeopardy. Instead, as noted above, such a finding is reserved for cases involving the misrepresentation and/or withholding of evidence by the prosecution so as to obtain an unfair verdict and hamper the defendant's ability to present a defense. Basemore, *supra*. Even clear acts of misconduct such as racial discrimination in jury selection cannot, without more, require the discharge of a defendant. Id.; *see also Chmiel*, *supra* (discharge not required after prosecutor's closing argument included unfounded accusations that defendant sexually assaulted murder victim; new trial was sufficient remedy).

The Petitioners have not even alleged, let alone proven, conduct meeting this exceptionally exacting standard. There are no allegations or evidence that the prosecutors themselves committed any acts that deprived juveniles of fair hearings. Without any wrongful actions by the prosecutors, there can be no finding that the Commonwealth so violated due process that discharge of the Petitioners would be required to vindicate their double jeopardy rights.

The Petitioners also suggest that the actions of the judge require discharge on double jeopardy grounds, based on a novel theory of "judicial misconduct" analogous to prosecutorial

misconduct. See Petitioners' Brief at pp. 27-38. The Petitioners rely on *dicta* in several cases indicating that judicial misconduct, like extreme prosecutorial misconduct, can result in due process violations requiring discharge.

Most of the Petitioners' argument in this regard conflates prosecutorial and judicial conduct together in a way that has never been found appropriate by any court, and then suggests that the judge's misconduct requires a remedy that Pennsylvania courts have never approved. While it is conceded that the Petitioners who were denied fair hearings by Ciavarella's criminal acts are entitled to new proceedings, there is simply no basis for finding that the judge's actions require the complete discharge of the Petitioners.

Even in cases where judges have committed gross misconduct calling into doubt the validity of the proceedings before them, the appellate courts have not granted a windfall to parties by discharging them and thus insulating them from any consequences for the actions that brought them before the court. In McFall, *supra*, a judge was rendered incurably partial towards the Commonwealth by her cooperation with a law enforcement investigation. The Pennsylvania Supreme Court found that the appropriate remedy was not the complete discharge of the juvenile and criminal defendants who had appeared before the judge, but rather the grant of new proceedings before other judges. The Court did not order that those defendants be discharged or the charges against them dismissed.

The present case is similar; the judge was involved in improper conduct rendering his decisions inherently suspect and requiring new proceedings. The remedy should also be similar. If the McFall petitioners were granted new proceedings, so should the Petitioners here. Granting a complete discharge to the Petitioners would be an unjustified windfall completely incompatible with the precedent of McFall, and therefore is an inappropriate remedy.

Further, this Court should be especially wary of granting relief to parties whose circumstances do not indicate that the judge's conflict of interest may have led to an improper result. No relief should be granted to any juvenile whose proceedings may have been conducted by a judge other than Ciavarella; there can be no appearance of impropriety in actions by any judge who did not have Ciavarella's financial interests. The relief granted by this Court must therefore be carefully crafted to reach only the juveniles whose adjudications are cast into doubt, and no further.

IV. PETITIONERS ARE ESTOPPED FROM CLAIMING THAT THE COMMONWEALTH BEARS RESPONSIBILITY FOR THE DENIAL OF THEIR CONSTITUTIONAL RIGHTS.

Petitioners suggest that the extreme relief they are seeking is warranted because the Commonwealth subverted their rights to a fair trial by turning "a blind eye to the improprieties in Ciavarella's courtroom." (Petitioners' brief at p. 40). However, Petitioners' statements are at odds with previous representations that they made to the court concerning the actions of the Commonwealth. On more than one occasion, Petitioners represented to the court that the Commonwealth was supporting them and that it "support[ed] juvenile court procedures that meet constitutional and statutory requirements." (Exhibit C to Petition, ¶19; Exhibit D to Petition, ¶24; Exhibit E to Petition, ¶15, Exhibit F to Petition, ¶15). Petitioners cannot make representations of the Commonwealth's support of their constitutional rights in one context and claim its silence as a basis for the extreme remedy it seeks here in another context. Having asserted in verified court filings that the Commonwealth was fully supportive of their rights, the Petitioners cannot now take a wholly contrary position.

V. **INACTION CANNOT GIVE RISE TO A COGNIZABLE CONSTITUTIONAL CLAIM AGAINST A STATE OFFICIAL FOR ACTIONS OF A WHOLLY SEPARATE BRANCH OF GOVERNMENT OVER WHICH THE OFFICIAL HAS NO AUTHORITY OR CONTROL.**

Petitioners' claim based upon failure of the District Attorney to object to the procedures that Judge Ciavarella followed in juvenile cases amounts to an attempt to obtain a remedy for failure to protect them against the actions of the judge. Since under the Unified Judicial System the District Attorney is not a supervisory authority over a judge of the Court of Common Pleas and the court is a wholly separate branch of government, Petitioners' claims are equivalent to those in which a government official is claimed to have an obligation to prevent injury from a private individual by virtue of a state-created danger. In essence, the Petitioners contend that the District Attorney has an obligation to prevent the courts from failing to observe their constitutional rights and that the failure to act allowed the danger to occur. Petitioners do not complain of any affirmative acts by the District Attorney, but only omissions.

The law in this circuit is abundantly clear that a claimed constitutional injury cannot give rise to a state created danger claim on the basis of a failure to act. Estate of Soberal v. City of Jersey City, 2009 WL 1668607, *2 (3d Cir. June 16, 2009); Walter v. Pike County, 544 F.3d 182, 194 (3d Cir. 2008); Phillips v. County of Allegheny, 515 F.3d 224, 236-37 (3d Cir. 2008). "Liability [can only be] predicated upon the states' *affirmative acts* which work to the plaintiffs' detriments in terms of exposure to danger." Walter, 544 F.2d at 194, citing Bright v. Westmoreland County, 443 F.3d 276, 282 (3d Cir. 2006), *cert. denied* ___ U.S. ___, 127 S.Ct. 1483, 167 L.Ed.2d 228 (2007). To satisfy this requirement for culpability, the charged official must have affirmatively acted to plaintiff's detriment and there must be direct causation between the affirmative action and the constitutional injury. In Bright, the court held that failing to seek

someone's detention or failing to arrest someone who poses a threat was not an affirmative use of authority.

In this case, the Petitioners have not charged the District Attorney with any conduct, but rather with a failure to act. Petitioners make clear that the violations of their rights arose from the concerted actions of the Juvenile Court judge, who established procedures for processing their claims that short-circuited due process requirements in a manner that casts doubt on whether they were sufficiently advised and aware of certain constitutional rights. It is not suggested that the District Attorney participated in any scheme or allowed the adjudications to proceed with knowledge of how their waivers were insufficiently obtained. Moreover, the claimed injury - imposition of excessive sentences to further the goal of increasing remuneration for detaining juveniles - was not related to any action or inaction of the Commonwealth. Under the applicable law, it is clear that the Petitioners cannot establish responsibility by the Commonwealth for the remedy they are seeking.

CONCLUSION

For the reasons stated herein, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court vacate the adjudications and dispositions of juveniles who appeared before Judge Ciavarella during the time frame in question. The Commonwealth also respectfully requests that this Honorable Court deny the Petitioners' request to preclude further proceedings on double jeopardy grounds, and grant as a remedy that new proceedings be held before a jurist whose fairness and impartiality are not in question.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I am on this day serving a true and correct copy of the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121:

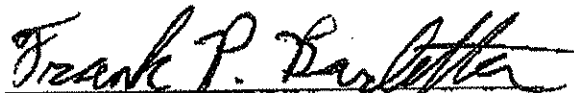
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