IN THE SUPREME COURT
FOR THE COMMONWEALTH OF PENNSYLVANIA
MIDDLE DISTRICT

No. 81 M.M. 2008

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

PETITIONERS' REPLY TO OBJECTIONS TO THE THIRD REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER BY THE COMMONWEALTH OF PENNSYLVANIA

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INTRODUCTION

After six months of painstaking investigation, and pursuant to the authority and directives set forth in this Court's February 11, 2009 Order, Special Master Senior Judge Arthur E. Grim submitted his Third Interim Report and Recommendations for this Court's consideration on August 12, 2009 ("Third Report"). Based upon his exhaustive findings and legal analysis, and after giving counsel generous opportunity to build the record and present legal argument,[1] the Special Master has set forth recommendations that, if adopted by this Court, shall bring a fair and just resolution to perhaps the most shocking affair of judicial malfeasance in our history. Specifically, the Special Master now recommends to this Court that the adjudications/consent decrees of all youth who appeared before former judge Mark A. Ciavarella, Jr. during the relevant time period be vacated; that the cases be dismissed with prejudice for all such youth who have completed their court-ordered dispositions for these adjudications/consent decrees and have been discharged from court supervision; and for those youth who have not received final discharge for these adjudications, that the Special Master review their cases individually and recommend the appropriate resolution, whether it be dismissal with prejudice or a re-trial. Third Report Part B, Third Interim Recommendations ¶¶ 1-2, at 31-32.

On September 9, 2009, the District Attorney of Luzerne County filed Objections to the Third Report on behalf of the Commonwealth ("D.A. Objections"). The District Attorney presents two arguments as to why this Court should not immediately adopt the Third Report and Recommendations in their entirety. First, the District Attorney argues that because former judge

[1] Prior to preparing the Third Report, the Special Master invited extensive briefing and oral argument by attorneys for the Petitioners in this matter and the Luzerne County District Attorney's Office on essentially two key questions: (1) whether Pennsylvania Supreme Court precedent requires this Court to vacate all adjudications of delinquency and consent decrees entered by former judge Mark A. Ciavarella, Jr. from 2003 through May 2008; and (2) whether the petitions against the juveniles whose adjudications/consent decrees are vacated must be dismissed because re-trial is barred by the Double Jeopardy Clauses of the United States and Pennsylvania Constitutions. Third Report and Recommendations of the Special Master ¶¶ 3-4, *In re J.V.R.; H.T*, No. 81 M.M. 2008 (Pa. Aug. 12, 2009) [hereinafter Third Report] .

Ciavarella withdrew his guilty plea to federal fraud charges on August 24, 2009,[2] the factual basis for many of the Special Master's findings may no longer exist and the instant matter should be remanded for further factual findings and an evidentiary hearing. Objections to the Third Report and Recommendations of the Special Master by the Commonwealth of Pennsylvania at 1-2, *In re J.V.R.; H.T*, No. 81 M.M. 2008 (Pa. Sept. 9, 2009)[hereinafter D.A. Objections]. Second, the District Attorney asserts that the Special Master erred in recommending that the majority of the cases to be vacated as per the Special Master's recommendation -- those that have been discharged upon the youth's successful completion of the court-ordered disposition -- should be dismissed with prejudice. *Id.* at 3-7.

Petitioners submit that the D.A.'s arguments in support of delaying resolution of these cases and requiring that new trials be held are without merit. Petitioners urge this Court to promptly adopt the Special Master's Third Report and Recommendations in their entirety.

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[2]Ciavarella and fellow former Luzerne County Court of Common Pleas judge Michael T. Conahan were subsequently indicted by a federal grand jury on September 9, 2009 in a 42-count indictment which includes charges of racketeering, fraud, money laundering, extortion, bribery, and federal tax violations and that they received millions of dollars in illegal payments. Indictment, *United States v. Conahan and Ciavarella.*, No. 3:09-CR-272 (M.D. Pa. Sept. 9, 2009). *See* Press Release, U.S. Dep't of Justice, Middle Dist. of Pa., Two Former Luzerne County Court of Common Pleas Judges Indicted on Racketeering, Fraud, Money Laundering, Tax and Related Charges (Sept. 9, 2009), attached at Appendix D. Ciavarella entered a plea of not guilty to the indictment on September 15, 2009.

ARGUMENT[3]

I. A REMAND FOR FURTHER FACT-FINDING AND AN EVIDENTIARY HEARING IS UNNECESSARY; AMPLE SUPPORT EXISTS BOTH IN THE SPECIAL MASTER'S THIRD INTERIM REPORT AND IN THE PUBLIC RECORD FOR THE FINDINGS AND RECOMMENDATIONS

The District Attorney requests that the instant matter be remanded for an evidentiary hearing, asserting that the factual basis for the Special Master's findings has been called into question by Ciavarella's withdrawal of his guilty plea. D.A. Objections at 1-2. Notably, the District Attorney recognizes that despite the withdrawal of the plea, the 2003 through 2008 proceedings over which Ciavarella presided "should not be deemed fair;" the District Attorney "steadfastly maintain[s]" that the "proper remedy" is to vacate all of the adjudications. *Id.* at 1. An examination of the Special Master's Third Report, as well as the public record, demonstrates that ample evidence exists, even in the absence of Ciavarella's guilty plea, to support the Special Master's findings that the proceedings before Ciavarella were indeed unfair and, therefore, the adjudications and consent decrees must be vacated.

The Special Master based his recommendation to vacate the adjudications and consent decrees of all youth who appeared before Ciavarella from 2003 through May 2008 on four key findings of fact: (1) former judge Ciavarella ordered placement of youth in PA Child Care and Western PA Child Care during this time period, Third Report ¶ 18; (2) Ciavarella received hundreds of thousands of dollars of improper payments from owners or principals of these entities, or other interested individuals, thus giving him a tangible financial interest in their operation, *id.* ¶¶ 18-24; (3) by the terms of the contracts between Luzerne County, PA Child Care and Western PA Child Care, the individuals making improper payments to Ciavarella

[3] Petitioners incorporate by reference herein Petitioners' Brief in Response to Special Master's Order of May 29, 2009, *In re J.V.R.; H.T.*, No. 81 M.M. 2008 (Pa. June 9, 2009) [hereinafter Petitioners' Brief].

benefitted financially for each child that Ciavarella placed in those facilities, *id.* ¶¶ 19-21, 23; and (4) that during the relevant time period, a total of 1,866 youth appeared without counsel before Ciavarella for delinquency proceedings, *id.* ¶ 30, in none of the hearing transcripts reviewed by the Special Master in which youth appeared without counsel did Ciavarella or anyone else in the courtroom ask if the juvenile knew he/she had a right to counsel, or if he/she wished to be represented by counsel, *id.* ¶ 31, "there is clear and convincing evidence that no juvenile who appeared without counsel between 2003 and May 2008 knowingly and intelligently waived his/her right to counsel," *id.* ¶ 32, and "Judge Ciavarella knew he was violating the law and court rules." *Id.* ¶ 33.

That former judge Ciavarella withdrew his guilty plea does not disturb these findings, as there is plentiful support elsewhere in the Third Report and in the public record to support them. It is undisputed that Ciavarella ordered youth into the PA Child Care and Western PA Child Care facilities during the relevant time period; these placements are well documented in the court and juvenile probation records examined by the Special Master. *Id.* ¶ 18 (citing Special Master's Order, *In re J.V.R.; H.T.*, No. 81 M.M. 2008 (Pa. May 28, 2008). As described above and in Part II.A *infra*, the results of the Special Master's first-hand review of data from the Luzerne County Juvenile Probation Office, and the transcripts of numerous proceedings before Ciavarella, abundantly support his findings of a persistent and widespread denial of youths' due process rights in that courtroom. Moreover, an analysis of the publically-available contracts between PA and Western PA Child Care and Luzerne County establishes that individuals affiliated with those facilities would be enriched with each child that Ciavarella placed there.[4]

[4] In their June 9, 2009 brief, Petitioners analyzed in detail the lucrative contracts 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, and attached these public documents as appendices to their brief. The agreements demonstrate that the

The last of the four key findings – that Ciavarella took improper payments from individuals affiliated with the facilities in which he placed hundreds if not thousands of youth – is well-supported by the public record *excluding* Ciavarella's now-withdrawn guilty plea. On July 1, 2009, Robert Powell entered a guilty plea to a two-count federal information charging him with misprision of a felony (wire fraud) and acting as an accessory after the fact in a conspiracy to file false tax returns. Transcript of Proceedings of Arraignment and Guilty Plea at 2 lines 2-11, *United States v. Powell*, No. 09-CR189 (M.D. Pa. July 1, 2009), excerpts attached at Exhibit A. At the plea hearing, the United States Attorney stated that if the matter had proceeded to trial the government would have presented evidence that from 2003 through 2007, Ciavarella and fellow former Luzerne County Court of Common Pleas judge Michael T. Conahan accepted more than $2.8 million from Powell, who was then a co-owner of PA Child Care and Western PA Child Care, and Robert K. Mericle, the builder of the facilities. *Id.* at 11 lines 15-22. The evidence would have shown that Powell made payments to the former judges by issuing checks to an entity controlled by the former judges and their wives so as to conceal the payments, and sometimes even having employees deliver a Fed Express box filled with cash to Conahan. *Id.* at 11 lines 23 through 14 line 12. Powell testified under oath as to the accuracy of the government's description of his relationship with Ciavarella and Conahan and the financial transactions with regard to PA Child Care and Western PA Child Care. *Id.* at 16 line 23 through 17 line 4.

Moreover, on September 2, 2009, Mericle entered a guilty plea in federal court to a charge of misprision of a felony, for failing to disclose his knowledge that Ciavarella and

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amount of monies these entities received was directly tied to the number of children who were placed at these facilities. Petitioners' Brief at 9-11, Appendices G-O, No. 81 M.M. 2008 (Pa. June 9, 2009).

Conahan were engaged in the commission of a felony, specifically the filing of false tax returns. Transcript of Proceedings of Arraignment and Guilty Plea at 4 line 7 through 5 line 8, *United States v. Mericle*, No. 09-CR-247, (M.D. Pa. Sept. 2, 2009), excerpts attached at Exhibit B. At the plea hearing, the United States Attorney described the following evidence which the government would have elicited if the matter had proceeded to trial: Mericle paid monies to Ciavarella for Ciavarella's role in recommending Mericle's company to build the PA Child Care facility, *id.* at 12 lines 3-10; Ciavarella directed Mericle to make it appear as if the monies were being paid to Powell, *id.* at 12 lines 11-13; at some point in time, Mericle became aware that both Ciavarella and Conahan were filing false tax returns and disguising the payments that Mericle made to the former judges as payments to Powell, *id.* at 13 lines 5-20, 15 lines 6-15; and Mericle made similar payments to Ciavarella, also disguised as payments to Powell, in connection with Mericle's building of the Western PA Child Care facility, *id.* at 14 lines 2-17, and the construction of an expansion to the PA Child Care facility. *Id.* at 14 line 18 through 15 line 5. Mericle testified under oath that the government's proffer was accurate. *Id.* at 19 line 22 through 20 line 3.

Finally, Ciavarella himself testified under oath, in a separate civil proceeding, that he accepted payments from Powell and Mericle in relation to the building of PA Child Care and Western PA Child Care, that he failed to disclose these payments, and that his omission was a violation of his duty to disclose information relevant to his ability to preside as an impartial jurist. Notes of Hearing Volume II at 380-89, *Joseph v. Scranton Times.* No. 2166-C-2009 (Pa. Ct. Com. Pl. July 2, 2009), excerpt attached at Exhibit C.

In *In re: McFall*, this Court held that "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." 617 A.2d 707, 711 (Pa. 1992). The public record as it stands today establishes that thousands of youth in Luzerne County were deprived of their right to be tried by an impartial tribunal. As the Special Master notes in the Third Report, this Court's King's Bench powers include "protect[ing] the liberty of the subject, by *speedy and summary interposition.*" Third Report ¶ 13 (citing *Commonwealth v. Onda*, 103 A.2d 90 (Pa. 1954)). Petitioners respectfully urge the Court to reject the District Attorney's request to further delay resolution of these proceedings as such delay is unwarranted and not in the public interest.

II. THE SPECIAL MASTER'S RECOMMENDATION FORECLOSING RE-TRIAL OF MOST YOUTH IS CONSISTENT WITH DOUBLE JEOPARDY JURISPRUDENCE AND WITHIN THE COURT'S KING'S BENCH POWERS

A. The Special Master's Recommendations Are Based On A Finding Of Unprecedented Judicial Misconduct; The Resulting Unfairness To The Youth Can Only Be Appropriately Remedied By Dismissal Without Prejudice Of The Cases In Question.

Based on an analysis and application of United States and Pennsylvania Supreme Court case law to the facts of this case, Third Report ¶¶ 36-45, the Special Master concluded that "new proceedings are barred by the double jeopardy clause of the Pennsylvania Constitution for all juveniles who appeared before Judge Ciavarella without counsel between 2003 and May 2008," *id.* ¶ 42, and "for all juveniles whom Judge Ciavarela committed to either PA Child Care or Western PA" during that same time period. *Id.* ¶ 43. The Special Master recommended the same result for all other children who were adjudicated delinquent by or received consent decrees from Ciavarella during this period, as the Court's King's Bench Powers allow it to remedy the "pall" that Ciavarella's misconduct cast on all proceedings. *Id.* ¶¶ 48-52. Because of the unprecedented nature of this misconduct, the Special Master did not and could not

mechanically apply the holdings of past cases but instead relied on the policies undergirding double jeopardy jurisprudence to reach his recommendations. Specifically, the Special Master noted that the double jeopardy bar is raised by a "breakdown of the integrity of the judicial proceeding.'" *Id.* ¶ 38 (quoting *Commonwealth v. Simons*, 522 A.2d 537, 539 (Pa. 1987) (quoting *Commonwealth. v. Starks*, 416 A.2d 498, 500 (Pa. 1980)). He further noted that our jurisprudence "clearly indicates that the double jeopardy clause protects criminal defendants from both prosecutorial, and judicial, impropriety," *id.* ¶ 42 (citing *United States v. Jorn*, 400 U.S. 470 (1971)), and concluded that an extension of this Court's holding in *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) is warranted where, as here, "a judge's conduct [is] intentionally undertaken to prejudice a defendant to the point of the denial of a fair hearing or trial." *Id.*

The District Attorney relies almost relies exclusively on *McFall* to argue that the only appropriate remedy, after vacating the adjudications/consent decrees, is to remand all the cases for new proceedings, as this was the resolution in *McFall*. But there is one dispositive difference between the facts in *McFall* and the instant case, a difference that demonstrates why this Court may use *McFall* as a starting point in fashioning an appropriate remedy but cannot end the inquiry there. Specifically, there were no allegations in *McFall* that the judge, who had an undisclosed bias in the proceedings over which she was presiding, violated the defendants' other due process rights during their trials. By contrast, as discussed in Part I.A. *supra,* the Special Master found that Ciavarella knowingly and intentionally violated the right to counsel of thousands of youth over a five-year period.

Moreover, an examination of the transcripts reviewed in the Third Report also demonstrates a persistent denial of youths' constitutional right to trial, with children entering guilty pleas without being adequately informed as to what conduct they were admitting to, or the

many rights they were giving up by pleading guilty, or even that they had a choice. An excerpt from the transcript of a 2005 hearing, reproduced in its entirety in the Third Report, illustrates the entrenched practice in Ciavarella's courtroom of accepting admissions from youth that were far from voluntary, knowing and intelligent:

THE COURT:	Okay. R[], you've been charged with a violation of the controlled substance, drug, device and cosmetic act. How do you wish to plead.
THE JUVENILE:	Guilty.
THE COURT:	Guilty or not Guilty?
THE JUVENILE:	Guilty.
THE COURT:	Based upon his admission, I'll adjudicate him delinquent. With R[], what seems to be the problem here?

Third Report ¶ 31.3 (quoting *In re R.H.*, No. 2005-86 (Pa. Ct. Com. Pl. March 30, 2005). *See also id.* ¶ 31.6 (quoting *In re K.S.*, No. 2006-543 (Pa. Ct. Com. Pl. Nov. 28, 2006)); *id.* ¶ 31.11 (quoting *In re E.T.*, No. 2007-423 (Pa. Ct. Com. Pl. Nov. 27, 2007)); *id.* ¶ 31.14 (quoting *In re R.G.*, no. 2007-548 (Pa. Ct. Com. Pl. Feb. 5, 2008)). The record demonstrates that Ciavarella failed time and time again to abide by the well-established principles of constitutional law that, prior to allowing a youth to enter a guilty plea, the court must give the child adequate notice of the nature and elements of the offense to which the child is making an admission, the child must be informed of the rights he is forgoing and the possible dispositions that the court could impose if he enters an admission, and that there is indeed a factual predicate for the admission. *See* discussion with citations to authority in Petitioners' Brief at 35-37.

If the only constitutional violation that Ciavarella committed had been violating the youths' right to an impartial tribunal, and *if* the youths' other due process rights had been

respected in his courtroom, then Petitioners might agree with the District Attorney's position that *McFall* counsels that a remand for new trials would be the appropriate remedy once the adjudications are vacated.[5] But that is not the case here. The Special Master has documented a five-year practice of systematically denying youth their constitutional rights to counsel and to proceed to trial. The Special Master's recommendation recognizes that while *McFall* provides a starting point for fashioning a remedy, its holding cannot be viewed as the complete and dispositive answer to this unprecedented case.[6]

Moreover, it is important to note that the District Attorney's Objections fail to discuss or address this Court's broad authority to exercise its King's Bench powers in ordering remediation in this matter. The Special Master concluded that, as an alternative basis for dismissing with prejudice the cases on double jeopardy grounds, this "Honorable Court's King Bench powers authorize you to reach the same result." *Id.* ¶ 44. The Special Master noted that "[i]t is abundantly clear … that this Court's King's Bench powers are broad and remedial in nature." *Id.* ¶ 15. Indeed, "[t]he jurisdiction of this court [of King's Bench] is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority… ." Third Report ¶ 12 (citing *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426 (Pa. 1948)). It is without question that

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[5] This question of course is not before the Court. While the hypothetical absence of the other misconduct by Ciavarella might support the District Attorney's argument against barring re-trial, the scope and magnitude of the financial payoffs here is also unlike any other case to date, and far beyond the level of payments at stake in *McFall*.

[6] The only other support offered by the District Attorney for its argument that the matters herein must be remanded for re-trial once the adjudications are vacated, are cases in which appellate courts remanded after overturning an adjudication because the court failed to obtain a constitutionally-valid waiver of rights. D.A. Objections at 5-6. The District Attorney states: "There has never been a single reported case in which the absence of a colloquy has led to a defendant being discharged; instead, courts have consistently found that a new trial or remedy is the appropriate remedy." *Id.* at 5-6 (citing *Commonwealth v. Brazil*, 701 A.2d 216 (Pa. 1997), *In re A.M.*, 776 A.2d 1263 (Pa. Super. Ct. 2001), and *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991)). Indeed, each of the cases cited dealt with a *single* instance, a *single* violation. By contrast, in these proceedings we are dealing with thousands of violations over a span of five years. The calculus that led to remand in those individual instances does not translate into adopting the same remedy for the enormity of the misconduct at issue here.

this Court possesses the authority to implement the recommendations of the Special Master in remediating the wrongs committed in this unique case.

B. Double Jeopardy Bars Re-trial Of Petitioners' Cases Due To The Prosecutorial Misconduct Of The District Attorney Who Failed To Raise Objections Or Report The Persistent Violations Of Due Process In Ciavarella's Courtroom Over A Five-Year Period.

Petitioners also argued in their June 9 brief that 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 and, consequently, double jeopardy prohibits the re-trial of all youth who were denied their right to counsel or entered constitutionally-invalid guilty pleas. Petitioners' Brief Part II.C., 39-40. The Special Master never reached the issue of whether prosecutorial misconduct occurred in these matters such that re-trial is prohibited under double jeopardy. Petitioners argue that there is ample support in the record for such a finding by this Court, in addition, or in the alternative, to the Special Master's findings regarding judicial misconduct.

As noted above, the Special Master examined a sampling of transcripts from hearings before Ciavarella from 2005 through 2008 in which youth appeared without counsel; in total, the Special Master reviewed 38 transcripts. *See* Third Report ¶ 31. In all but one of the transcripts, the Special Master found

> [t]here was not a *single word* ... concerning the juvenile's right to counsel. Neither Judge Ciavarella *nor anyone else in the courtroom* asked if the juvenile knew he/she had a right to counsel; neither Judge Ciavarella *nor anyone else in the courtroom* asked the juvenile if he/she desired counsel.

Third Report ¶ 31.2 (emphasis in the original for the first sentence; emphasis added in the remaining sentences).

Thus, in addition to Ciavarella's affirmative denial of the children's due process rights, it is clear in the transcripts reviewed by the Special Master that the representative of the District Attorney present in the courtroom acquiesced in the wholesale denial of the children's constitutional rights. Petitioners submit that even an exhaustive review of the transcripts of the thousands of cases presided over by Ciavarella would not yield a single objection by a representative of the District Attorney's office to the practice of children proceeding without counsel and without making valid waivers, or waiving their right to trial and entering guilty pleas that were far from voluntary or knowing. Failing to object once or even a few times when a youth proceeds without counsel in the absence of a voluntary and knowing waiver does not rise to the level of prosecutorial misconduct. But failing to object 1,866 times does. *See* Third Report ¶ 30 (finding that 1,866 juveniles appeared before Ciavarella for delinquency proceedings without counsel from 2003 through 2008). Moreover, the transcripts reviewed in the Third Report demonstrates a pattern and practice of youth entering guilty pleas that could not even remotely be deemed as knowing, intelligent or voluntary, thus waiving their constitutional right to trial. *See* discussion at Part II.B *supra.* As with the violation of youths' right to counsel, the representatives of the Commonwealth stood mute as this illegal practice played out in Ciavarella's courtroom every day for five years.[7]

As the United States Supreme Court has held, the policy underlying the constitutional prohibition against placing a defendant twice in jeopardy is that

> the 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

[7] While upon information and belief all of the children who appeared without counsel ultimately pled guilty, many children represented by counsel entered into unconstitutional guilty pleas as well. Thus, the number of times the representative of the District Attorney stood silent as these unlawful guilty pleas were entered is actually substantially larger than 1,866.

> embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). As discussed in Part II. B. *supra*, if the *only* constitutional violation was that Ciavarella was not impartial and the youths' other due process rights had been respected in his courtroom, then the District Attorney's position that *McFall* counsels that a remand for new trials is the appropriate remedy once the adjudications are vacated might have more merit. But that is not the case here. The Special Master has documented a five-year practice of systematically denying youth their most basic and well-established constitutional rights to counsel and trial. United States and Pennsylvania Supreme Court case precedent instruct that the Commonwealth, having acquiesced in this well-entrenched yet illegal custom, have forfeited a second opportunity to prosecute these youth.

C. In Recommending Dismissal With Prejudice Of The Cases Of Youth Who Have Completed Their Dispositions, The Special Master Has Struck The Correct Balance Between Protecting The Public Welfare And Remedying The Widespread Constitutional Violations.

In determining whether double jeopardy bars re-trial, 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. *Oregon v. Kennedy*, 456 U.S. 667, 670-72 (1982); *U.S. v. Jorn*, 400 U.S. 470, 479-81 (1971). *See also United States v. Tateo*, 377 U.S. 463, 466 (1964) (noting that a defendant's right to a fair trial is balanced against the societal interest in punishing those who have committed crimes). In recommending the dismissal with prejudice of the cases of youth who have already completed their court-ordered dispositions and who have been discharged from court supervision, the Special Master achieved the appropriate balance between redress of the constitutional violations and the public interest in holding

individuals accountable and deterring criminal conduct. The Special Master specifically found that "neither the victims, the juveniles nor the community will benefit by having new proceedings in these cases" because

> by virtue of these juveniles having received their final discharge, it has been determined (a) that they have received all the services, assistance, and supervision which they needed, and (b) they have complied with the conditions which the court imposed. In addition, they have already served their debt to society.

Third Report ¶ 51.

The District Attorney asserts that the Special Master's recommendation of dismissal with prejudice of the cases for which youth have already completed their court-ordered dispositions denies justice and fairness to the victims of the crimes for which the youth were originally adjudicated. But this argument falls under the weight of the facts. The Special Master recommends dismissal with prejudice *only* of those cases in which youth have fulfilled all the requirements of their court-ordered dispositions. Thus, if the Court adopts this recommendation, re-trial will be barred *only* for those cases in which the youth have done everything that the Commonwealth asked them to do to make amends for their alleged acts, 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. The District Attorney mistakenly suggests that an order of this Court adopting the Special Master's recommendations of dismissal with prejudice of these youths' cases would "grant[] a windfall to parties by discharging them and thus insulat[e] them from any consequences for the actions that brought them before the court." D.A. Objections at 6-7. As the Special Master's findings demonstrate, this is simply not the case. Far from being insulated,

these youth have already served and completed the dispositions imposed on them by a court that was essentially operating outside the law. [8]

The District Attorney's Objections also may incorrectly leave the public with the perception that youth who are still under court supervision for offenses for which they were adjudicated by Ciavarella will be "let off the hook" and simply released from programs and facilities, thus endangering the public. But the Special Master has specifically recommended that he review all cases in which youth are still under court supervision and make an individualized recommendation as to whether a new trial is warranted. Third Report Part B, "Third Interim Recommendations," ¶¶ 1-2.[9] In these individualized reviews of still-open cases, the Special Master can take into account whether each such youth has appropriately made amends for his/her acts, including making restitution to the victims, along with the risk that the youth poses to the community, and then propose a resolution that ensures justice to the victims and the protection of the community while simultaneously remediating the constitutional violations.[10]

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[8] Indeed, it is the Commonwealth that would reap a "windfall" should this Court permit re-trial of these cases, as the Commonwealth would effectively be given the opportunity to see children endure a *second* trial for the exact same offense. Where the prescribed disposition has *already been completed*, no possible purpose can be served, nor any public interest vindicated, by imposing yet another trial. And a second trial would serve no purpose as double jeopardy protects 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. 163, 176 (1874). So even if re-tried, these youth, who have already completed their dispositions, may not be punished again.

[9] The Special Master believes that the number of cases that he proposes to review individually will be small in number and can be reviewed expeditiously. Third Report ¶ 52.

[10] The Special Master does not recommend such an individualized review in those cases in which the youth has completed his/her court-ordered disposition and has been discharged from the court's supervision, precisely because such a review is unwarranted given that those cases are already closed. *See* Third Report ¶ 51.

CONCLUSION

WHEREFORE, for the foregoing reasons and any other reasons that may appear to this Court, Petitioners respectfully request that the Court adopt in its entirety the Third Interim Report and Recommendations of the Special Master.

Respectfully submitted,

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I hereby certify that on September 24, 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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