

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

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

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**OBJECTIONS TO THE REPORT AND RECOMMENDATIONS
OF THE SPECIAL MASTER**

I. THE PRESENT MATTER SHOULD BE REMANDED FOR A DETERMINATION AS TO THE EFFECT OF THE WITHDRAWAL OF FORMER JUDGE CIAVARELLA'S GUILTY PLEA ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER.

Former Judge Mark Ciavarella presided over juvenile cases in Luzerne County while allegedly maintaining a financial interest in the very juvenile detention center in which he was placing juveniles. He continually failed to conduct on-the-record colloquies before permitting juveniles to proceed without counsel and was indicted on federal charges that suggest there was an improper financial motive for his actions. Although his guilty plea to the federal charges was withdrawn on August 24, 2009, admissions he made following his indictment, including sworn testimony he provided in an unrelated civil hearing, remain. Consequently, although Ciavarella may now be presumed innocent, the juvenile proceedings he presided over between 2003 and 2008 should not be presumed fair. After learning that Ciavarella may have compromised his courtroom in a manner that calls into question the fairness of the juvenile proceedings he handled, the Commonwealth steadfastly maintained that all juvenile adjudications and dispositions over which the former judge presided between 2003 and 2008 must be vacated. The Commonwealth continues to assert that this is the proper remedy. However, in recommending that new proceedings are barred on double jeopardy grounds, the Special Master impermissibly expands double jeopardy protections in a manner that denies the victims of those crimes justice and fairness at a time when all involved are trying so desperately to restore those principles to juvenile courtrooms in Luzerne County.

At the time of the original briefs in this matter and the issuance of the Third Interim Report and Recommendations, a federal plea agreement was in place in which Ciavarella admitted wrongdoing. However, on August 24, 2009, Ciavarella withdrew his guilty plea, and as such, the factual basis for many of the Special Master's findings may no longer exist.

At the very least, this Court should remand this matter so that the Special Master can set forth the factual findings underlying the Report and Recommendations and can, if needed, conduct evidentiary proceedings to develop the record. The factual basis for the Special Master's decision was called into question when Ciavarella withdrew his guilty plea. To the extent that the Special Master relied upon the guilty plea, this Court should consider and address the effect of that withdrawal on the Report and Recommendations. Other facts may still support the Special Master's findings, but this Court must base that determination on a factual record. The Commonwealth of Pennsylvania therefore respectfully requests that this Court order a remand so that the Special Master can set forth the factual basis for his findings.

The Commonwealth acknowledges that the lack of counsel in most of the juvenile proceedings and Ciavarella's out-of-court admissions still create an appearance of impropriety requiring the grant of new proceedings. However, as the Commonwealth further argues below, the Special Master has overridden and misapplied the law in recommending that the affected juvenile cases be dismissed with prejudice.

II. THE SPECIAL MASTER ERRED BY RECOMMENDING THAT THE MAJORITY OF THE AFFECTED JUVENILE CASES BE DISMISSED WITH PREJUDICE AND THAT NEW PROCEEDINGS BE PROHIBITED UNDER DOUBLE JEOPARDY PRINCIPLES; THE APPROPRIATE REMEDY FOR JUDICIAL MISCONDUCT AFFECTING THE FAIRNESS OF A PROCEEDING IS A NEW PROCEEDING.

The Special Master has recommended that the charges against the vast majority of the affected juveniles be dismissed with prejudice, precluding the Commonwealth from seeking new adjudications. The Commonwealth objects to this Recommendation in that it is overbroad, is inconsistent with past precedent, and fails to take into account the Commonwealth's interest in protecting the general public. The Commonwealth therefore respectfully requests that this Honorable Court decline to adopt that portion of the Report and Recommendations, and instead order that new juvenile proceedings be allowed to take place.

This Court, as paramount authority over the Unified Judicial System, has the power to determine how to rectify the illegal conduct of judges under its supervision. Only this Court can determine whether that conduct has deprived the citizens of the Commonwealth and the victims of crime of the opportunity to have justice administered fairly and has affected the due process rights of those accused of the crimes. However, in eradicating the stain on the court system created by Ciavarella, the Court must ensure that it does not unintentionally endorse broader recoveries than are appropriate or permitted under the law. The Petitioners' own submissions demonstrate that each proceeding involved unique circumstances and considerations, making a blanket assertion of a double jeopardy bar wholly inappropriate and unjustifiable.

The Commonwealth agrees that the conduct necessitating these proceedings is unprecedented. The only case Petitioners have cited that involves underlying criminal conduct by a sitting judge is In the Interest of McFall, 617 A.2d 707 (Pa. 1992). However, the

disqualifying interest in McFall was the threat of a ruling favorable to the prosecution to obtain favorable treatment in subsequent criminal proceedings. Here, the Court is faced with how to undo the outcome of court proceedings that are alleged to themselves involve criminal activity.

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 case, the judge's improper interests infected the fairness of the proceedings. This 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.

The exhibits submitted to the Special Master 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 former judge is alleged to have 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.

By finding that double jeopardy principles prohibit further juvenile proceedings, the Special Master expanded double jeopardy protections far beyond anything that has ever been sanctioned by this or any other Court. There is no factual basis or legal authority to support the

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, this Court did not order that the juveniles and other defendants be discharged; instead, it 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.

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).

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 the former judge's alleged misconduct requires the complete discharge of all of the juveniles on double jeopardy grounds.

A judge's failure to give legally required colloquies cannot require the Petitioners' discharge. 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 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 shows, 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 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 recommended by the Special Master here. The cumulative impact of the large number of cases does not require a different result. Indeed, in McFall, as here, this Court addressed the impact of a judge's misconduct on a large number of cases, and found that new proceedings, not a complete discharge, was the required remedy. The present matter requires an identical result.

In arguing that Ciavarella's actions require discharge on double jeopardy grounds, based on a novel theory of "judicial misconduct" analogous to prosecutorial misconduct, the Petitioners relied 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 Ciavarella'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 misconduct are entitled to new proceedings, there is simply no basis for finding that his 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 never 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. This 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; Ciavarella was involved in allegedly 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.


CONCLUSION

For the reasons stated herein, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court remand the present matter for a determination as to the effect of the withdrawal of former judge Ciavarella's guilty plea on the Report and Recommendations of the Special Master. Further, the Commonwealth respectfully requests that this Honorable Court decline to adopt those portions of the Special Master's Report and Recommendations that call for the charges against the affected juveniles to be dismissed with prejudice. The Commonwealth requests that further proceedings be allowed to take place before a judge whose fairness and impartiality are not in question.

Respectfully submitted,


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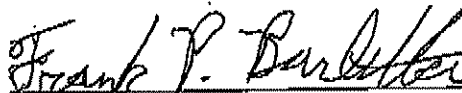
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