IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

In re: Expungement of Juvenile Records and vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003-2008; related to In re: J.V.R.; H.T., a Minor through her Mother, L.T., on behalf of themselves and similarly situated youth	:	**No. 81 MM 2008**
	:	**(Arthur E. Grim, S.J., Special Master)**

THIRD INTERIM REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

The undersigned Special Master respectfully submits this Third Interim Report and Recommendations, pursuant to the authority and directives set forth in your Honorable Court's Order dated February 11, 2009.

A. BACKGROUND.

1. On March 12, 2009, I submitted my First Interim Report and Recommendations in the above-captioned matter, which recommended for a certain group of juveniles accused of relatively minor crimes who appeared before Judge Mark A. Ciavarella, Jr. in Luzerne County Juvenile Court, that all consent decrees and adjudications of

delinquency in their cases be vacated, and that their records be expunged. The First Interim Report and Recommendations also noted that some juveniles might wish to delay the expungement of their records until they could obtain copies of records and information needed to proceed with civil actions they had already filed.

2. By Order of March 26, 2009, your Honorable Court adopted and approved the First Interim Report and Recommendations, with the following qualification:

> The Special Master has noted that some of the affected juveniles or their counsel may wish to delay expungement until they can collect records and information for use in pending civil lawsuits. This Court's primary concern remains with identifying and correcting miscarriages of justice in the underlying criminal consent decrees and adjudications as quickly as possible. Accordingly, once appropriate cases are identified according to the criteria the Special Master has set forth, orders of vacatur and expungement shall be entered promptly. This directive in no way shall affect the discretion of the Special Master to provide reasonable advance notice to affected juveniles, and to entertain specific, supported requests to delay the effect of the expungement aspect of such orders.

3. On May 28, 2009, pursuant to the authority set forth in your Honorable Court's February 11, 2009 Order, I issued an Order directing counsel to brief the following issues:

   3.1. Does *In re McFall*, 533 Pa. 24, 617 A.2d 707 (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?

3.2. 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?

4. Counsel for the Petitioners and the District Attorney of Luzerne County each submitted a brief, and on July 17, 2009 in Wilkes-Barre, I heard oral argument from counsel on the above-enumerated issues.

5. My legal analysis follows.

B. **DISCUSSION.**

6. On January 30, 2009, the Petitioners filed with this Honorable Court a Motion for Reconsideration of Denial of Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction.

7. By Order dated February 11, 2009, this Honorable Court stated, "[T]his Court hereby assumes plenary jurisdiction over this matter. See Pa. Const. art. V, § 10; 42 Pa. C.S. § 502."

8. Article V, section 10 of the Pennsylvania Constitution addresses only judicial administration in the Commonwealth, including the Supreme Court's supervisory and administrative authority. This section does not deal with the Supreme Court's jurisdiction.

9. Title 42 Pa. C.S. § 502 states in pertinent part as follows:

> The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722."

10. This Honorable Court's extraordinary jurisdiction is authorized by 42 Pa. C.S. §726.

11. Based upon the citation to 42 Pa. C.S. § 502 in the Court's February 11, 2009 Order in support of its assumption of jurisdiction in this matter, I conclude that the Court intended to assume jurisdiction over this matter pursuant to its King's Bench power.

(i). <u>The Pennsylvania Supreme Court's King's Bench Powers.</u>

12. In *Carpentertown Coal & Coke Co. v. Laird*, 360 Pa. 94, 61 A.2d 426 (1948), this Honorable Court, speaking through then-Justice Horace Stern, stated the following regarding it's Court's King's Bench powers:

> Inherent in the Court of King's Bench was the power of general superintendency over inferior tribunals, a power which was of ancient inception and recognized by the common law from its very beginnings. Blackstone says, Book III, 42: "The jurisdiction of this court [of King's Bench] is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below." By the Act of 1722 the Supreme Court of Pennsylvania was placed in the same relation to all inferior jurisdictions that the King's Bench in England occupied .... 360 Pa. at 99, 61 A.2d at 428.

13. In *Commonwealth v. Onda*, 376 Pa. 405, 103 A.2d 90 (1954), this Honorable Court further explained its King's Bench powers, speaking through now Chief Justice Horace Stern:

> More than two centuries ago section XIII of the Act creating the Supreme Court of this Commonwealth, Act of May 22, 1722, . . . , provided that the court should "minister justice to all persons, and exercise the jurisdictions and powers

> hereby granted, concerning all and singular the premises, according to law, as fully and amply, to all intents and purposes whatsoever as the justices of the court of king's bench, common pleas, and exchequer, at Westminster, or any of them, can or may do." . . . What were the "jurisdictions and powers" of the Justices of the Court of King's Bench thus conferred upon the Supreme Court? " . . . It [includes] protect[ing] the liberty of the subject, *by speedy and summary interposition.*" [Emphasis in original].

14. I note that the language from the Act of May 22, 1722 (creating the Supreme Court of Pennsylvania) stating that the court should "minister justice to all persons" was explicitly carried forward to 42 Pa. C.S. § 502.

15. It is abundantly clear from the foregoing authorities that this Court's King's Bench powers are broad and remedial in nature.

(ii). <u>In re McFall</u>.

16. In response to the question in my May 28, 2009 briefing Order, "Does *In re McFall*, 533 Pa. 24, 617 A.2d 707 (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," the Petitioners' counsel and the Luzerne County District Attorney both agree that all adjudications of delinquency and all consent decrees entered by Judge Ciavarella during the above-stated period must be vacated. *See* Petitioners' brief filed on or about June 9, 2009, p. 1; Commonwealth's brief filed on or about July 10, 2009, p. 7. Despite the concurrence of counsel on this issue, I believe some discussion of it is warranted.

17. In *In re McFall*, your Honorable Court summarized the facts and legal issues as follows:

> [Judge Mary Rose Fante] Cunningham was recorded accepting a $300.00 gift from Steven Traitz, Jr., an official of the Roofers Union. Upon learning that the conversation had been recorded, and being confronted by federal authorities,

> Cunningham agreed to cooperate with the F.B.I. in an ongoing investigation involving cash gifts from the Roofers Union to various judges of the Philadelphia County Court of Common Pleas.

533 Pa. at 31, 617 A.2d at 711. Your Honorable Court continued,

> Specifically, Cunningham became an undercover agent for federal law enforcement authorities in exchange for a promise that those authorities would make her cooperation known to any agency that chose to prosecute her for accepting a gift from a potential litigant.

533 Pa. at 31, 617 A.2d at 711.

> The circumstances under which Cunningham participated as an "agent" of both the judiciary and the prosecution crated an environment of partiality which is unacceptable. She continued to hear criminal cases while cooperating with the federal authorities in exchange for a promise that her cooperation would be made known to the District Attorney of Philadelphia, whose office prosecuted each appellee [juvenile] and would be the same office that would make the judgment as to her prosecution.

533 Pa. at 35-36, 617 A.2d at 713.

> The possibility existed that Cunningham may have treated the District Attorney's Office in a way so as to maximize her chances for leniency should it choose to prosecute her. This possibility is all that is needed to establish the appearance of impropriety.

533 Pa. at 37, 617 A.2d at 714.

Your Honorable Court concluded,

> We hold herein 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. Therefore, . . . we affirm the order of the Superior Court affirming [Common Pleas] Judge Temin's grant of new proceedings to all appellees whose cases were argued before Cunningham during the time she cooperated with the Federal Bureau of Investigation . . . .

533 Pa. at 31, 617 A.2d at 711.

18. As more fully stated in the background portion of my May 28, 2009 Order,

- PA Child Care, a secure juvenile detention and treatment facility in Pittston Township, Luzerne County, opened in approximately February 2003;
- Judge Mark A. Ciavarella, Jr., as the Luzerne County Juvenile Court judge, began sending juveniles to PA Child Care shortly after it opened;
- The entity which owned PA Child Care built Western PA Child Care, located in Butler County, Pennsylvania;
- Western PA Child Care opened in summer or early fall 2005, and Judge Ciavarella, as the Luzerne County Juvenile Court judge, began sending juveniles there after it opened; and
- Sometime during the period 2000 through 2006 or 2007, PA Child Care, or its owners or principals, made, or participated in making, hundreds of thousands of dollars of improper and illegal payments to Judge Ciavarella and Judge Michael T. Conahan.

19. It appears undisputed that for each juvenile sent to PA Child Care by the Luzerne County Juvenile Court from early 2003 until late 2004, Luzerne County paid a per-person, per-day fee to PA Child Care.

20. During the period from early 2003 until late 2004, when Luzerne County paid a per-person, per-day fee to PA Child Care for each juvenile that Judge Ciavarella sent there, PA Child Care, or individuals associated with it, participated in making hundreds of thousands of dollars of improper and illegal payments to Judge Ciavarella.

21. Stripped to its essence, each juvenile whom Judge Ciavarella sent to PA Child Care enriched the individuals and/or entities who were making illegal payments to Judge Ciavarella. Judge Ciavarella had a tangible financial incentive, at least during the period from early 2003 until late 2004, to send juveniles to PA Child Care.

22. Judge Ciavarella's financial incentive, from early 2003 until late 2004, to send juveniles to PA Child Care is precisely the type of appearance of impropriety and conflict of interest, according to *McFall*, which requires that the rulings and dispositions be vacated.

23. Beginning in late 2004, there was a change in the method of determining how much Luzerne County would pay PA Child Care, and later, Western PA Child Care, for juveniles sent to those facilities by the Luzerne County Juvenile Court. Nonetheless, PA Child Care, or its owners or principals, continued to make, or continued to participate in making, hundreds of thousands of dollars of improper and illegal payments to Judge Ciavarella in 2005 and thereafter, according to the Criminal Information in *United States v. Michael T. Conahan and Mark A. Ciavarella, Jr.*, 3:09-CR-028 (U.S. District Court, M.D. Pa.), ¶¶ 18-21, 39, to which charges Judge Ciavarella has already entered a guilty plea.

24. Because the aforementioned illegal payments to Judge Ciavarella continued after late 2004, the appearance of impropriety and conflict of interest of the type discussed in *McFall* also continued. Since Judge Ciavarella continued to send juveniles to PA Child Care and Western PA Child Care until he stopped sitting in juvenile court in May 2008, it is my opinion that the appearance of impropriety and conflict of interest did not, and could not, end until May 2008.

25. In summary, *In re McFall* requires that all adjudications of delinquency and all consent decrees be vacated for those juveniles who appeared before Judge Ciavarella (with or without counsel) between 2003 and May 2008, and who were committed by Judge Ciavarella to either PA Child Care or Western PA Child Care.

26. It is a close question whether *In re McFall* requires all other adjudications of delinquency and consent decrees entered by Judge Ciavarella between 2003 and May 2008 to be vacated – i.e., in cases where juveniles were not sent to PA Child Care or Western PA Child Care.

27. For reasons set forth below in section (v.), I do not need to decide the difficult question posed in the preceding paragraph.

(iii) Juveniles who appeared before Judge Ciavarella without counsel.

28. In my First Interim Report and Recommendations, which was approved by your Honorable Court, I stated the following in the Background section:

> 1. Rule 151 of the Pennsylvania Rules of Juvenile Court Procedure ("Assignment of Counsel") states the following in subsection A:
>
> > "A. General. If counsel does not enter an appearance for the juvenile, the court shall inform the juvenile of the right to counsel prior to any proceeding. In any case, the court shall assign counsel for the juvenile if the juvenile is without financial resources or otherwise unable to employ counsel."
>
> 2. Rule 152 of the Pennsylvania Rules of Juvenile Court Procedure ("Waiver of Counsel") provides as follows in subsection A:
>
> > "A. Waiver requirements. A juvenile may not waive the right to counsel unless:

> "(1) the waiver is knowingly, intelligently, and voluntarily made; and
>
> "(2) the court conducts a colloquy with the juvenile on the record."

3. The Pennsylvania Rules of Juvenile Court Procedure, including Rules 151 and 152, were adopted April 1, 2005 and became effective October 1, 2005.

4. Long before the adoption of the Pennsylvania Rules of Juvenile Court Procedure, both the United States Supreme Court and the Pennsylvania Legislature took action ensuring that a juvenile has a right to counsel in juvenile delinquency proceedings, and if the juvenile is unable to afford counsel, counsel will be provided for him or her. *In re Gault*, 387 U.S. 1, 41, 87 S. Ct. 1428, 1451 (1967); 42 Pa. C.S. § 6337 (effective June 27, 1978).

5. Also long before the adoption of the Pennsylvania Rules of Juvenile Court Procedure, your Honorable Court stated the following concerning the appropriate inquiry which must occur before a criminal defendant will be deemed to have waived his or her constitutional right to counsel:

> " 'While an accused may waive his constitutional right, such a waiver must be the 'free and unconstrained choice of its maker' [citation omitted] and also must be made knowingly and intelligently [citation omitted]. To be a knowing and intelligent waiver defendant must be aware of both the right and of the risks of forfeiting that right. [Citation omitted]. '
>
> "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."

Commonwealth v. Monica, 528 Pa. 266, 273, 597 A.2d 600, 603 (1991).

. . .

10. 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.

29. Your Honorable Court also approved the recommendation in my First Interim Report and Recommendations that for any juvenile who appeared before Judge Ciavarella in juvenile court between 2003 and May 2008, and who was alleged to have committed certain enumerated low-level offenses and who met certain other criteria, any consent decree and/or adjudication of delinquency therein would be vacated, and his/her records would be expunged, provided that the juvenile:

> (ii) was not represented by counsel at said hearing or proceeding; and
>
> (iii) did not waive his/her right to counsel, or did not waive it in conformity with Pa.R.Juv.Ct.P. 152, or, for proceedings prior to October 1, 2005, did not waive it in a manner such that there is evidence in the record of waiver meeting the standard enunciated in *Commonwealth v. Monica*, 528 Pa. 266, 597 A.2d 600 (1991)[.]

30. Since the time of my First Interim Report and Recommendations, the Luzerne County Juvenile Probation Office ("LC-JPO") has performed a thorough, and almost Herculean, review of the cases in which juveniles appeared without counsel before Judge Ciavarella for delinquency proceedings between 2003 and May 2008. LC-JPO's review revealed the following:

- In 2003, 369 different juveniles appeared without counsel before Judge Ciavarella for various delinquency proceedings.
- In 2004, 434 different juveniles appeared without counsel before Judge Ciavarella for various delinquency proceedings.
- In 2005, 385 different juveniles appeared without counsel before Judge Ciavarella for various delinquency proceedings.
- In 2006, 356 different juveniles appeared without counsel before Judge Ciavarella for various delinquency proceedings.
- In 2007, 259 different juveniles appeared without counsel before Judge Ciavarella for various delinquency proceedings.
- In the first five months of 2008, 63 different juveniles appeared without counsel before Judge Ciavarella for various delinquency proceedings.

31. I have reviewed the following sampling of transcripts from hearings and proceedings before Judge Ciavarella in which juveniles appeared without counsel:

31.1. For the year 2005, I reviewed the transcripts from twelve (12) hearings before Judge Ciavarella in which the juvenile appeared without counsel. These hearings occurred in eleven (11) different months – two were in May, and none was in September.

31.2. There was not a single word in any of the twelve transcripts 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.

31.3. The following transcript from a 2005 hearing, reproduced in its entirety, where the juvenile appeared before Judge Ciavarella without counsel, is representative of the other transcripts from that year:

> (Whereupon, the following occurred on March 30, 2009:)
>
> (Whereupon, the juvenile and all parties were duly sworn.)
>
> 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?
>
> THE JUVENILE: I guess I just had a problem with it for a little bit.
>
> THE COURT: How's the problem now?
>
> THE JUVENILE: It's done and over with now.
>
> THE COURT: If you test, how are you going to test?
>
> THE JUVENILE: Clean.
>
> THE COURT: Absolutely positive?
>
> THE JUVENILE: Yes.
>
> THE COURT: Don't guess. If I test you, after you test, you'll be clean?

THE JUVENILE: No. I said yes.

THE COURT: Are you testing hot?

THE JUVENILE: No.

THE COURT: If you test hot I'm shipping you out, understood?

THE JUVENILE: Yes.

THE COURT: How much marijuana was involved here?

THE POLICE OFFICER: A small amount. Just three small zip lock bags.

THE COURT: I'll put R[] on probation subject to the rules and regulations of the department. You'll do everything that's in the order. You'll participate in any programs they deem appropriate. If you screw up, you can come back and see me and we'll find a place to put you to help you deal with your problem, understand?

THE JUVENILE: Yes, Your Honor.

THE COURT: Thank you.

(Whereupon, the proceeding concluded.)

In re: R.H., No. 2005-86 (March 30, 2005).

31.4. For the year 2006, I reviewed the transcripts from ten (10) hearings before Judge Ciavarella in which the juvenile appeared without counsel. These hearings occurred in eight (8) different months – two were in January; two were in September, and none were in March, May, July, or October.

31.5. Once again, there was not a single word in any of the ten transcripts 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.

31.6. The following transcript from a 2006 hearing, reproduced in its entirety, where the juvenile appeared before Judge Ciavarella without counsel, is representative of the other transcripts from that year:

> [K.S., the juvenile], having been duly sworn, was examined and testified as follows:
>
> THE COURT: K[], it says here that you have been charged with violation of the Controlled Substance, Drug[,] Device and Cosmetic Act. How do you wish to plead?
>
> THE JUVENILE: Guilty.
>
> THE COURT: Based upon her admission, I will adjudicate her delinquent. Where did this occur?
>
> THE JUVENILE: School.
>
> THE COURT: What grade are you in?
>
> THE JUVENILE: Eighth.
>
> THE COURT: Were you at the school when I was there?
>
> THE JUVENILE: Yeah.
>
> THE COURT: What did I say about drugs in school?
>
> THE JUVENILE: That you're going to get – well, you're going to get arrested in school.
>
> THE COURT: What else did I tell you?
>
> THE JUVENILE: That you will get arrested and get charged.
>
> THE COURT: What did I say I will do?

THE JUVENILE: Send us away.

THE COURT: Did you think I was kidding?

THE JUVENILE: No.

THE COURT: Very good. She will be remanded. Send her to FACT. Let her stay there until she learns her lesson. I mean what I say. Thank you.

(At this time, the proceedings in the above-captioned matter has [sic] concluded.)

In re: K.S., No. 2006-543 (November 28, 2006).

31.7. For the year 2007, I reviewed the transcripts from fourteen (14) hearings before Judge Ciavarella in which the juvenile appeared without counsel. These hearings occurred in eleven (11) different months – none were in January; two were in July; and three were in November.

31.8. There was not a single word in twelve of the fourteen transcripts concerning the juvenile's right to counsel. In these twelve transcripts, 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.

31.9. In the thirteenth transcript, the entire discussion concerning the juvenile's right to counsel was as follows:

(Whereupon [C.E.] and [K.K.], the Juveniles, were duly sworn.)

THE COURT: What is our game plan here, hearing? Do we need a hearing in this matter?

MR. K[.] [juvenile's parent]: I think we settled it last week, Judge.

THE COURT: I think maybe you settled it amongst yourselves, but you didn't settle it with the juvenile justice system.

MR. K[.]: We don't know how [to] do that, Sir.

THE COURT: Well, let's do this then: C[.], you've been charged with disorderly conduct and harassment. How do you wish to plead?

THE JUVENILE [C.E.]: Guilty.

THE COURT: And K[.], you've been charged with disorderly conduct and harassment. How do you wish to plead?

THE JUVENILE [K.K.]: Not guilty.

THE COURT: Commonwealth may call their first witness.

[A.D.A.] MR. KILLINO: Commonwealth will call –

THE COURT: Which one of these young ladies has signed a waiver?

MR. SKREPANAK [probation officer]: Miss E[.], Judge.

THE COURT: K[.] [the other juvenile], do you need a lawyer?

MR. K[.]: If we can settle this, Judge, no.

THE COURT: The only way we're going to settle this is we're going to have a hearing to determine whether or not your daughter committed the crime of disorderly conduct and the summary offense of harassment.

THE JUVENILE [K.K.]: Can we just plead guilty and get it over with?

THE JUVENILE [K.K.]'S FATHER: No, we don't need a lawyer, Your Honor.

THE COURT: So, you're going to make an admission? Are you going to make an admission, ma'am?

THE JUVENILE [K.K.]: What's an admission?

THE COURT: Guilty?

THE JUVENILE [K.K.]: Yeah.

THE COURT: Based opinion [sic] her admission, I'll adjudicate her delinquent.

In re: C.E., No. 2007-459 (November 14, 2007), pp. 2-3.

31.10. In the fourteenth transcript, the entire colloquy concerning the juvenile's right to counsel was as follows:

[S.M.] and all prospective witnesses are sworn.

THE COURT: Good morning, S[.].

THE JUVENILE: Good morning.

THE COURT: Is this your signature on the written waiver of counsel?

THE JUVENILE: Yeah.

THE COURT: Mom, is that yours also?

[MOTHER]: Yes, sir.

THE COURT: Do you both understand this document?

THE JUVENILE: Yes.

[MOTHER]: Yes.

THE COURT: Do you understand the attachment?

THE JUVENILE: Yeah.

THE COURT: The Court is going to find that both mom and daughter have made a knowing and voluntary waiver of counsel.

All right, S[.]. What seems to be the problem here?

In re: S.M., Docket no. not provided (June 8, 2007), pp. 2-3.

31.11. The following transcript from a 2007 hearing, reproduced in its entirety, where the juvenile appeared before Judge Ciavarella without counsel, is representative of the other transcripts from that year where there was no discussion of the juvenile's right to counsel:

(All interested parties were duly sworn.)

THE COURT: E[], you've been charged with false swearing; false ID; purchase, consumption[,] possession, transportation of liquor, malt or brewed beverages. How do you wish to plead?

THE JUVENILE: Guilty.

THE COURT: Based upon his admission, I'll adjudicate him delinquent.

What happened here?

SERGEANT SEMYON: Your Honor, I was called to a disturbance of intoxicated juveniles running in the area. When I went into the house, Mr. T[.] [the juvenile] and 14 other kids were having a party there. And what I did is I asked everybody their name, gave them a piece of paper to write it down, their addresses and everything. And he gave me the wrong name.

THE COURT: Why would you do that?

THE JUVENILE: I don't know. I panicked; I didn't know what to do.

THE COURT: All right. I'm going to follow the recommendations of the probation department. He'll participate in

the specialty court. He'll be on probation, participate in the underage drinking program, and he'll have a drug and alcohol evaluation.

And he'll do every and anything that the probation department directs.

Good luck to you. Thank you.

THE JUVENILE: Thank you.

(Proceedings concluded.)

In re: E.T., No. 2007-423 (November 27, 2007).

31.12. For the months January through May, 2008, I reviewed the transcripts from two hearings before Judge Ciavarella in which the juvenile appeared without counsel. One hearing took place in February, and the other was in March.

31.13. In the March hearing, there was not a single word in the transcript concerning the juvenile's right to counsel.

31.14. The transcript of the February hearing follows, reproduced in its entirety, including the entire colloquy concerning the juvenile's right to counsel:

(Whereupon, all parties were sworn.)

THE COURT: T[.] [juvenile's Mother], R[.] [juvenile], you had an opportunity to review the waiver of counsel document?

[JUVENILE'S MOTHER]: Yes, sir.

THE JUVENILE: Yes, sir.

THE COURT: Is there anything in it that you did not understand?

[JUVENILE'S MOTHER]: No, sir.

THE JUVENILE: No, sir.

THE COURT: Is that your signature on the documents?

[JUVENILE'S MOTHER]: Yes, sir.

THE JUVENILE: Yes, sir.

THE COURT: R[.], you've been charged with disorderly conduct. How do you wish to plead?

THE JUVENILE: Guilty.

THE COURT: Based upon his admission I will adjudicate him delinquent.

What were you thinking about?

THE JUVENILE: I don't know.

THE COURT: Were you at Crestwood [High School] when I was there?

THE JUVENILE: Yeah.

THE COURT: Did you hear what I had to say?

THE JUVENILE: Yeah.

THE COURT: Did you think I was kidding?

THE JUVENILE: No.

THE COURT: Why would you do this? Why would you make me send you away?

THE JUVENILE: I don't know.

THE COURT: I will remand him to Camp Adams. He will be in the ACT Program. He will stay at Camp Adams until he learns how to make better decisions. While he's at Camp Adams I want a drug and alcohol eval completed. And if required when he's done I want intensive outpatient relative to any problems they might find.

[JUVENILE'S MOTHER]: Excuse me, sir. I do have a letter. He is seeking counseling.

THE COURT: Give it to Mr. Piazza, please. How will you test for drugs today?

THE JUVENILE: I will pass.

THE COURT: Good. He will be remanded.

(Whereupon, the hearing concluded.)

In re: R.G., Docket no. 2007-548 (February 5, 2008).

32. Based upon my review of the transcripts described above from hearings and proceedings before Judge Ciavarella in which juveniles appeared without counsel, I conclude that there is clear and convincing evidence that no juvenile who appeared before Judge Ciavarella without counsel between 2003 and May 2008 knowingly and intelligently waived his/her right to counsel. Stated another way, no juvenile who appeared before Judge Ciavarella without counsel between 2003 and May 2008 waived his/her right to counsel in a manner which satisfies the standard enunciated in *Commonwealth v. Monica*, 528 Pa. 266, 597 A.2d 600 (1991). *A fortiori*, no juvenile who appeared before Judge Ciavarella without counsel between October 1, 2005 and May 2008 waived his/her right to counsel in a manner which satisfies Pa.R.Juv.Ct.P. 152.

33. I also conclude Judge Ciavarella knew he was violating the law and court rules by failing to conduct any, or legally adequate, waiver of counsel colloquies for the juveniles appearing before him. I base this conclusion upon (a) the transcripts I have reviewed, (b) the sheer number of juveniles, enumerated above, who appeared before Judge Ciavarella without

counsel between 2003 and May 2008, and (c) the fact that Judge Ciavarella was reversed by the Pennsylvania Superior Court in the delinquency case *In re A.M.*, 766 A.2d 1263 (Pa. Super. 2001), for failing to provide counsel for the juvenile and/or failing to conduct an appropriate waiver of counsel colloquy.

34. Your Honorable Court has indicated that the remedy for a criminal defendant who proceeds to trial *pro se* without making a knowing and intelligent waiver of his/her constitutional right to counsel is to vacate the verdict. *Commonwealth v. Brazil*, 549 Pa. 321, 701 A.2d 216 (1997); *Commonwealth v. Monica*, 528 Pa. 266, 597 A.2d 600 (1991).

35. Based upon the foregoing analysis, all juveniles who appeared before Judge Ciavarella without counsel between 2003 and May 2008 for adjudication hearings or hearings which resulted in the entry of consent decrees are entitled to have the adjudications of delinquency and consent decrees vacated.

(iv) <u>The Double Jeopardy Clause bar to new proceedings</u>.

36. In *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed.2d 543 (1971), the trial judge granted a mistrial without a request to do so by the prosecutor or defense attorney. The issue presented to the U.S. Supreme Court was whether the double jeopardy clause of the Fifth Amendment to the U.S. Constitution barred a re-trial of the defendant. Writing for the Court in *Jorn*, Justice Harlan eloquently explained the purpose and parameters of the double jeopardy clause:

> The Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. [*Benton v. Maryland*, 395 U.S. 784 (1969), made the federal double jeopardy clause applicable to the States.] . . . [I]n *Green v. United States*, 355 U.S. 184, 187-188 (1957), . . . the Court noted that the policy underlying

this provision "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 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 he may be found guilty." These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. [Citations omitted.]

But it is also true that a criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, e.g., the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times. . . . [I]t becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide. . . .

Thus, the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings. The question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without the defendant's consent.

400 U.S. at 479-480 (footnote omitted).

Justice Harlan continued as follows:

Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. Thus, for example, reprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction. [Citations omitted.] . . .

If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might bethought to warrant a declaration of mistrial. Thus, 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 reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial *error*. (fn. 12: *Conversely, where a defendant's mistrial*

motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. [Citation omitted.])

400 U.S. at 483-485 (one footnote omitted; emphasis added).

37. Analyzing the facts and law presented in *Jorn*, the U.S. Supreme Court stated,

> [W]e must conclude that the trial judge here abused his discretion in discharging the jury. . . . Therefore, we must conclude that in the circumstances of this case, appellee's [defendant's] reprosecution would violate the double jeopardy provision of the Fifth Amendment.

400 U.S. at 486-487.

38. In *Commonwealth v. Simons*, 514 Pa. 10, 13, 522 A.2d 537, 539 (1987), your Honorable Court stated,

> Our analysis of double jeopardy must begin with a reaffirmation of the distinction between mere prosecutorial error and overreaching which "*signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which* the double jeopardy clause was designed to protect against." *Commonwealth v. Starks*, 490 Pa. 336, 416 A.2d 498, 500(1980); [other citation omitted; emphasis in original].

The *Simons* court also stated that previously, the Pennsylvania Supreme Court had interpreted Pennsylvania's double jeopardy clause (Pa. Const., Art. 1, § 10) to be co-extensive with the U.S. Constitution's double jeopardy clause.

39. In 1992, your Honorable Court broke new ground in double jeopardy jurisprudence in *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), a case stemming from schoolteacher Susan Reinert's death.

40. In *Commonwealth v. Smith*, your Honorable Court explained,

> At issue is whether the double jeopardy clause bars retrial following intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence; previously, we have held

> that "double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct." *Commonwealth v. Simons*, 514 Pa. 10, 16, 522 A.2d 537, 540 (1987), adopting the federal constitutional standard set forth in *Oregon v. Kennedy*, 456 U.S. 667 (1982).

532 Pa. at 179, 615 A.2d at 322.

Your Honorable Court resolved the issue as follows:

> Regardless of what may be required under the federal standard, however, our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.
>
> We now hold 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 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.

532 Pa. at 186, 615 A.2d at 325.

41. The double jeopardy clauses of the United States Constitution and the Pennsylvania Constitution both apply to delinquency proceedings in juvenile court in Pennsylvania. *In re Huff*, 399 Pa. Super. 574, 582 A.2d 1093 (1990); *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed.2d 346 (1975).

42. I conclude 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 for adjudication hearings or hearings which resulted in the entry of consent decrees. My conclusion is based upon the following: your Honorable Court ruled in *Commonwealth v. Smith, supra*, that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant when the prosecutor's conduct is intentionally undertaken to prejudice the defendant to the point of the denial of a

fair trial; *United States v. Jorn, supra,* clearly indicates that the double jeopardy clause protects criminal defendants from both prosecutorial, and judicial, impropriety; the holding of *Commonwealth v. Smith, supra*, should be extended to cover a judge's conduct which is intentionally undertaken to prejudice a defendant to the point of the denial of a fair hearing or trial; and Judge Ciavarella's intentional actions that denied counsel to hundreds of juveniles and prevented hundreds of juveniles from making knowing and intelligent waivers of counsel were intentionally undertaken to prejudice the juveniles to the point of denial of a fair hearing or trial.

43. I also conclude that new proceedings are barred by the double jeopardy clause of the Pennsylvania Constitution for all juveniles whom Judge Ciavarella committed to either PA Child Care or Western PA Child Care between 2003 and May 2008. My conclusion is based upon both *Commonwealth v. Smith*, *supra*, and *Commonwealth v. Simons*, *supra.* Judge Ciavarella's actions were egregious conduct "intentionally undertaken" which "prejudiced[d] the [juveniles] to the point of the denial of a fair [hearing]." *Commonwealth v. Smith*, 532 Pa. at 186, 615 A.2d at 325. Furthermore, Judge Ciavarella's actions in committing juveniles to juvenile facilities which were involved in making large, illegal payments to him is far more than judicial error; it constitutes misfeasance which "signals the breakdown of the integrity of the judicial proceedings". *Commonwealth v. Simons*, 514 Pa. at 13, 522 A.2d at 539.

44. In the alternative to reaching the results recommended above pursuant to the double jeopardy clause of the Pennsylvania Constitution, I conclude that your Honorable Court's King's Bench powers authorize you to reach the same result – dismissing with prejudice

(a) the cases of those juveniles whom Judge Ciavarella committed to either PA Child Care or Western PA Child Care between 2003 and May 2008, and (b) the cases of those juveniles who appeared before Judge Ciavarella without counsel between 2003 and May 2008 for adjudication hearings or hearings resulting in consent decrees. A discussion of your Honorable Court's King's Bench powers is presented in section (v) below.

45. If new proceedings are barred by the double jeopardy clause for the juveniles enumerated in paragraphs 43. and 44. who had their prior adjudications of delinquency or consent decrees vacated, then they are entitled to have their juvenile delinquency case records expunged pursuant to 18 Pa. C.S. § 9123(a)(1). Similarly, those same cases which, in the alternative, I recommended be dismissed with prejudice pursuant to your Honorable Court's King's Bench powers, are likewise entitled to expungement pursuant to 18 Pa. C.S. § 9123(a)(1).

(v) <u>The remaining cases</u>.

46. The remaining cases are those involving juveniles (a) who appeared before Judge Ciavarella with counsel between 2003 and May 2008, and (b) who were not committed to either PA Child Care or Western PA Child Care between 2003 and May 2008. (These cases will hereinafter be referred to as "the Remaining Cases".)

47. As noted above, your Honorable Court's King's Bench powers include the authority, and obligation, to "minister justice to all persons" in Pennsylvania. 42 Pa. C.S. § 502. The

King's Bench powers also include "protect[ing] the liberty of the subject, by speedy and summary interposition." *Commonwealth v. Onda, supra,* 376 Pa. 405, 103 A.2d 90.

48. Because of the wide scope of Judge Ciavarella's misbehavior, and the unusually large sum of illegal payments he received from, or with the participation of, people and entities involved with the juvenile justice system, Judge Ciavarella's actions have cast a pall over all of the juvenile matters he handled during the period from 2003 to May 2008.

49. In light of this pall, and because of the expansive authority included in your Honorable Court's King's Bench powers, it would be well within your Honorable Court's power to vacate the adjudications of delinquency and consent decrees of the Remaining Cases. I believe your Honorable Court should vacate the adjudications of delinquency and consent decrees in the Remaining Cases, particularly since all counsel agree that this should be done.

50. Title 18 Pa. C.S. § 9123(a) contains a presumption that juvenile delinquency case records shall be expunged, at the latest

> (3) [when] five years have elapsed since the final discharge of the person from commitment, placement, probation or any other disposition and referral and since such final discharge, the person has not been convicted of a felony, misdemeanor or adjudicated delinquent and no proceeding is pending seeking such conviction or adjudication; . . . .

51. For juveniles in the Remaining Cases who have received final discharge from commitment, placement, probation, or any other disposition or referral, and who have paid all fines, restitution, and fees assessed against them, it is my opinion that neither the victims, the juveniles, nor the community will benefit by having new proceedings in these cases.

Stated another way, 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. For juveniles who fit in this category, I recommend:

51.1. that the petitions against them be dismissed with prejudice, and

51.2. that expungement of their records be handled in accordance with 18 Pa. C.S. § 9123.

52. For juveniles in the Remaining Cases who have not received final discharge from commitment, placement, probation, or any other disposition or referral, or who have not paid all fines, restitution, and fees assessed against them, I recommend that I review each of these cases to determine an appropriate resolution, whether it be dismissal with prejudice and expungement, a new hearing, or some other resolution. I am confident that the Remaining Cases which I propose be reviewed individually will be small in number, and can be reviewed expeditiously.

For the foregoing reasons, I make the following recommendations:

B. THIRD INTERIM RECOMMENDATIONS.

1. I recommend that for all cases in which Judge Mark A. Ciavarella, Jr. entered adjudications of delinquency or consent decrees between January 1, 2003 and May 31, 2008, inclusive:

1.1. That all such adjudications of delinquency and consent decrees be vacated;

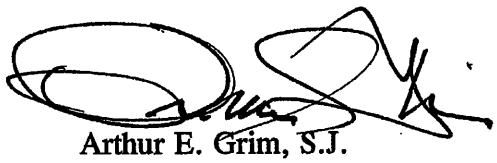
1.2. That in all such cases in which the juvenile has not received final discharge from commitment, placement, probation, or any other disposition or referral, or in which the juvenile has not paid all fines, restitution, and fees assessed against him/her, that I review each of these cases promptly to determine an appropriate resolution, whether it be dismissal with prejudice and expungement, a new hearing, or some other resolution;

1.3. That in all other cases, the petition or the complaint be dismissed with prejudice, and the records of such case, wherever kept or retained, shall be expunged, with such copies retained under seal in accordance with any other Order of this Court; and

1.4. That notwithstanding subparagraph 1.2 above, in all such cases in which the juvenile would have received final discharge from commitment, placement, probation, or any other disposition or referral, except that the juvenile has failed to pay all fines, restitution, and fees assessed against him/her, and for which there is an outstanding balance of $200.00 or less, then such cases shall be treated as if falling under subparagraph 1.3, provided the outstanding balance is paid forthwith.

2. I recommend that for all other cases in which Judge Mark A. Ciavarella, Jr. presided over any hearing or proceeding between January 1, 2003 and May 31, 2008, and which (a) is not covered by paragraph 1 above and (b) is not covered by the provisions of your Honorable Court's March 26, 2009 Order, that I make a recommendation regarding said cases promptly, as soon as I am able to determine what these cases involve.

Respectfully submitted,



Date: Fri., Aug. 7, 2009

Arthur E. Grim, S.J.
Special Master