IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FLORENCE WALLACE ET AL. Plaintiffs, v. ROBERT J. POWELL ET AL., Defendants.	**CONSOLIDATED TO:** Civil Action No. 3:09-cv-0286 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM CONWAY ET AL., Plaintiffs, v. MICHAEL T. CONAHAN ET AL., Defendants.	Civil Action No. 3:09-cv-0291 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

H.T. ET AL., Plaintiffs, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0357 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0630 (JUDGE CAPUTO)

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO AMEND MASTER COMPLAINT FOR CLASS ACTIONS

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I. INTRODUCTION

For five years, Defendants Ciavarella and Conahan played the leads in a Shakespeare-like drama of avarice and arrogance whose shocking details are only now being disclosed to a world audience. The Luzerne County district attorneys and public defenders played able supporting roles, assuring the success of this sordid tale. In a stunning display of acquiescence, at best, or active cooperation, at worst, these officials stood mute as the most fundamental constitutional rights of thousands of children were violated. Plaintiffs now come before this Court to ask that Luzerne County ("Luzerne" or the "County"), having acted through its officials and shielded no longer by the closed doors of juvenile court, be held accountable.

Luzerne seeks to escape liability for its officials' conduct by arguing, among other things, that it had no control over them and/or that they were not County policymakers. Luzerne's arguments are premature, as it seeks, under the rubric of "futility," to re-cast its response to Plaintiffs' Motion to Amend as a Rule 12(b)(6) motion to dismiss. Given the liberal pleading standards under the Federal Rules and this Court's broad discretion to manage this complex litigation, this Court need not even address Luzerne's Rule 12(b)(6) claims at this time.

If they are addressed, Luzerne's purported futility arguments fall of their own weight. If indeed the County had no control over its district attorney or public

defender, the case law is clear that this underscores, rather than undermines, their roles as final decision makers. Their status as county officials is also well supported by state law. Through their complicity in the violations of Plaintiffs' constitutional rights, these officials implemented a county policy, custom or practice to ignore federal and state law in the day-to-day operations of its juvenile court. Luzerne is properly named as a defendant; particularly given the very early stage of this litigation, the allegations against it in Plaintiffs' proposed Amended Complaint should stand.

II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION TO AMEND WITHOUT ADDRESSING THE DETAILED MERITS OF PLAINTIFFS' CLAIMS AGAINST THE COUNTY

The Federal Rules of Civil Procedure reflect a liberal pleading philosophy concerning motions to amend complaints. Leave to amend should be "freely" granted when justice so requires. Fed. R. Civ. P. 15(a); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). "A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)(2)." *Moore's Federal Practice* § 15.14[1] (3d ed. 2009). Additionally, this Court has the discretion – and responsibility – to manage this litigation fairly and efficiently.

These principles should guide it in exercising its broad discretion[1] in ruling on Plaintiffs' Motion.

While most of Luzerne's brief, presented under the rubric of "futility" (Luz. Br. 6-28), is devoted to a detailed attack on the sufficiency of the proposed Amended Complaint – essentially a full argument in support of a motion to dismiss that has not yet even been filed – the Court need not fully confront that attack here.[2] Instead, it should grant the Motion to Amend and postpone consideration of the Amended Complaint's sufficiency until a timely renewed motion to dismiss[3] is filed in accordance with the Case Management Order.

In light of liberal pleading rules and the trial court's broad discretion, some courts have recognized that granting leave to amend does not require finding that a future motion to dismiss would be denied. Rather, in considering motions to amend, some courts have found it unnecessary to engage in a detailed "futility"

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[1] *See Foman v. Davis*, 371 U.S. 187, 182 (1962) ("[T]he grant or denial of an opportunity to amend is within the discretion of the District Court . . . .").

[2] While Luzerne gives passing mention to factors other than "futility" – undue delay, bad faith, and dilatory motive (Luz. Br. 6) – that are relevant to motions to amend, Plaintiffs' Motion was filed well within the time period set by the Court (*see* Amendment to Case Management Order, No. 09-0286, Doc. No. 132 (M.D. Pa. June 22, 2009)), and the County cannot point to any evidence of undue delay, bad faith, or dilatory motive.

[3] While Luzerne filed a motion to dismiss the class action complaint on July 27, 2009, that motion will be mooted if Plaintiffs' Motion to Amend is granted.

analysis. *See, e.g., Becker v. Univ. of Neb. at Omaha*, 191 F.3d 904, 908 (8th Cir. 1999) ("[A] motion to amend should be denied on the merits 'only if it asserts clearly frivolous claims or defenses.' Likelihood of success on the new claim . . . is not a consideration for denying leave to amend unless the claim is clearly frivolous.").[4] "As long as the amendment is not a frivolous or dilatory measure, and is made in good faith, it should be granted." *Johnson v. Helicopter & Airplane Servs. Corp.*, 389 F. Supp. 509, 514 (D. Md. 1974).

The reasoning of these courts is sound. If a motion to amend is granted, a comprehensive motion to dismiss can be brought at a later time when the precise contours of the operative complaint have been fully determined. For example, in *Jenn-Air Products v. Penn Ventilator Inc.*, 283 F. Supp. 591, 595 (E.D. Pa. 1968), the district court for the Eastern District of Pennsylvania, in granting leave to amend, explained that "[t]he defendant's contention regarding legal sufficiency could be raised by a motion to dismiss under Rule 12(b)(6), at which time the parties can deal with these considerations more thoroughly." 283 F. Supp. at 596.

[4] The proposed Amended Complaint is hardly frivolous. Its allegations of County responsibility, through the district attorney and public defender, for deliberate indifference to the deprivation of Plaintiffs' constitutional rights (*see, e.g.*, Proposed Amended Master Complaint for Class Actions ("PAC") ¶¶ 818-29), plainly deserve the most serious consideration.

Similarly, in *Braddy-Robinson v. Hilton Scranton Hotel & Conference Center*, this Court, when presented with a "futility" argument in response to a motion to amend, noted the "futility" standard and then reasoned that

> it is as yet unclear whether circumstances warranting [dismissal] will come to light. It is clear, however, that granting [p]laintiffs leave to amend so as to make their factual and legal allegations more specific . . . *cannot be considered futile for purposes of Federal Rule of Civil Procedure 15(a)*.

No. 08-0286, 2008 WL 4425281, at *4 (M.D. Pa. Sept. 24, 2008) (Caputo, J.) (emphasis added); the Court granted the motion because it "was not a certainty that the claims cannot withstand a renewed motion to dismiss." *Id.* at *5. Analogously, here, the Court should grant leave to amend and then address in detail the "sufficiency" issues raised by Luzerne in the context of a renewed motion to dismiss.

Importantly, granting the Motion to Amend without a detailed futility analysis is fully supported by the Court's inherent power and responsibility to manage this complex litigation. *See* Manual for Complex Litigation (Fourth) § 10.1 (2004) ("The Federal Rules of Civil Procedure . . . contain numerous grants of authority that supplement the court's inherent power to manage litigation."). The Manual for Complex Litigation recognizes that "[f]air and efficient resolution of complex litigation requires at least that . . . the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial

proceedings." *Id.* § 10. "Case-management plans ordinarily prescribe a series of procedural steps with firm dates to give direction and order to the case . . . ." *Id.* § 10.13.

In this litigation, through its Case Management Order and a series of status conferences and additional orders, the Court has scheduled pretrial proceedings so that issues are raised, narrowed and addressed in an orderly fashion. Motions for abstention and to dismiss various parties on immunity grounds are currently pending. (*See* Doc. Nos. 170, 188, 210, 216, 221.) The Court stated at the October 1 status conference that it will set a date for filing other dispositive motions under Rule 12 at the October 28 hearing on the immunity and abstention motions. (*Cf.* Case Management Order ¶ 10.) Luzerne should not be permitted to bypass the Court's schedule and the Case Management Order in this complex matter by forcing Plaintiffs to defend their Motion to Amend under a Rule 12(b)(6) standard.[5] Otherwise, the County would effectively get two bites at the "sufficiency apple," one in this motion and the other in a subsequent motion to dismiss. In order to avoid this result, the Motion to Amend should be granted and

[5] If, notwithstanding the Case Management Order, the Court chooses to engage in a comprehensive "futility" analysis here, *see, e.g.*, *Pride Mobility Prods. Corp. v. Dylewski*, No. 08-231, 2009 WL 1044608, at *3 (M.D. Pa. Apr. 17, 2009) (Caputo, J.) (citing *In re Burlington Coat Factory*, 114 F.3d at 1434), the proposed Amended Complaint easily meets the standard of Rule 12(b)(6). *See* Part III, *infra*.

detailed examination of the "sufficiency issue" deferred until the timely filing of a renewed motion to dismiss.

III. THE MOTION TO AMEND SHOULD BE GRANTED EVEN IF THE PROPOSED AMENDED COMPLAINT IS TESTED BY RULE 12(b)(6) STANDARDS

Even if the Motion to Amend is evaluated on a Rule 12(b)(6) standard, it easily passes muster.[6] *Monell v. Department of Social Services of the City of New York* recognized that a municipality may be held liable under 42 U.S.C. § 1983 if the plaintiff can identify a municipal policy, custom, or practice that is "so permanent and well settled" as to have the "force of law." 436 U.S. 658, 691 (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)); *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996); *Andrews v. City of Phila.*, 895 F2d 1469, 1480 (3d Cir. 1990); *Mills v. City of Harrisburg*, 589 F. Supp. 2d 544, 555-56 (M.D. Pa. 2008)). The acquiescence of the district attorney and public defender in the denial of basic constitutional rights to thousands of juveniles is precisely such a "policy, custom or practice." As set forth below, Luzerne's scattershot arguments (a) challenging the existence of a "policy, custom or practice"; (b) questioning the nexus between the "policy, custom or practice" and

[6] Of course, under that standard, all well-pleaded allegations of the proposed Amended Complaint must be taken as true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

constitutional violations; and (c) denying the status of the district attorney and public defender as county policymakers for § 1983 purposes, are of no merit.

A. The Allegations Of The Proposed Amended Complaint Satisfy The "Policy, Custom Or Practice" Requirements Of *Monell* And Its Progeny

1. The Acquiescence Of The District Attorney And Public Defender In Unconstitutional Waivers Of Counsel And Guilty Pleas Constitutes A County Policy, Custom Or Practice For Purposes Of § 1983 Liability Under *Monell*

Luzerne contends that Plaintiffs have not identified a policy, custom or practice that can trigger municipal liability. (Luz. Br. 18-20.) The argument flatly mischaracterizes the County policy, custom or practice at issue.

Contrary to the assertions in Luzerne's brief, Plaintiffs have *not* claimed that the district attorney and public defender are responsible for Ciavarella's corrupt scheme to accept cash for the adjudications and placements of juveniles. (Luz. Br. 19-21.) What Plaintiffs *do* claim is that these county actors are accountable for their acquiescence in thousands of unconstitutional waivers of counsel and acceptances of unconstitutional guilty pleas in Ciavarella's courtroom over a period of five years. (PAC ¶¶ 818-29.) As alleged in the proposed Amended Complaint, it was the "well-settled" policy, custom and practice of the district attorney and public defender to do nothing in the face of thousands of juveniles'

unconstitutional waivers of counsel and guilty pleas, despite their presence in the courtroom and direct participation in these cases. (PAC ¶ 728.)[7]

Under *Monell*, a custom need not be formally approved by a decisionmaker as long as it is widespread. *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003); *Mills*, 589 F. Supp. 2d at 555. The Third Circuit has held that custom may be established simply by proof of knowledge of and acquiescence in the continuing conduct. *Fletcher v. O'Donnell*, 867 F.2d 791, 793-94 (3d Cir.1989) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 n.10 (1986)). This Court recognized that "custom is established 'by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law.'" *Hernandez v. York County*, No. 06-1176, 2007 WL 4198017, at *4 (M.D. Pa. Nov. 26, 2007), *aff'd*, 288 F. App'x 781 (3d Cir. 2008), (quoting *Watson v. Abington Twp*., 478 F.3d 144, 155 (3d Cir. 2007)). While courts have rejected claims for municipal liability in cases involving a single incident of a constitutional violation by one employee who was not following lawful municipal policies, *see e.g., Landano v. Hudson County*, No. 99-4705, 2006 WL 1374048, at *4-5 (D.N.J. May 18, 2006), that is far from the

[7] The district attorney's office was counsel and in the courtroom in every case. The public defender's office was in the courtroom for thousands of the cases and regularly acquiesced in unlawful guilty pleas of many of its clients.

case here; the district attorney and public defender engaged in a five-year practice of acquiescing in the persistent violations of thousands of juveniles' constitutional rights.

The Third Circuit explained in *Bielevicz v. Dubinon* that a plaintiff can establish custom by showing "policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations." 915 F.2d 845, 851 (3d Cir. 1990). The policymaker's failure to correct unlawful conduct ratifies the unlawful custom. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). In *Bielevicz*, the Third Circuit reversed a directed verdict for the defendant because it found compelling testimony "from which a jury could reasonably infer that [the chief of police] knew that the charge of public drunkenness was used [by police officers] to incarcerate individuals who were not intoxicated, yet failed to take affirmative steps to remedy this problem." 915 F.2d at 854. Here, analogously to *Bielevicz*, the district attorney and public defender, as alleged in the proposed Amended Complaint, plainly knew of the constitutional violations in Ciavarella's courtroom; their officers were present at and participated in the proceedings during which those violations occurred.[8]

[8] Moreover, the district attorney knew of Ciavarella's previous reversal by the Pennsylvania Superior Court due to a similar violation of waiver of counsel. (*See* PAC ¶ 169.) Indeed, in that appeal, the district attorney's office conceded in

(continued...)

Nor does the fact that the underlying constitutional violations themselves were committed by Ciavarella limit Luzerne's liability. Significantly, the Third Circuit, in a case not even addressed by Luzerne but cited by Plaintiffs in support of this Motion, expressly found that a judge's unlawful policy does not excuse city officials from complying with the law. In *Anela v. Wildwood*, city officials followed a bail schedule established by a municipal court judge that actually violated a state criminal procedure rule. 790 F.2d 1063, 1066-67 (3d Cir. 1986). The court found that the city's "routine noncompliance with the controlling [law] 'could be ascribed to municipal decisionmakers' and amounted to a 'policy' under *Monell* for purposes of section 1983 liability." *Id*. at 1067.

Although the facts here are even more shocking, *Anela* is on all fours with this case. Like the officials in *Anela*, the district attorney and public defender, as alleged in the proposed Amended Complaint, routinely ignored controlling law in acquiescing in Ciavarella's practice of denying juveniles who appeared before him their most basic constitutional rights. Through its district attorney and public defender, Luzerne exhibited, for over five years, a "blatant and routine disregard . . . of an applicable legal procedure designed to preserve the right of citizens" –

(continued...)

its brief that the youth was unfairly denied counsel at both his adjudicatory and disposition hearings. *In re A.M.*, 766 A.2d 1263, 1264-65 (Pa. Super. Ct. 2001).

namely, the due process guaranteed by the Constitution and the Juvenile Act. *Id.* This amounts to a "policy" or "practice so permanent and well settled as to have the force of law" as construed by *Monell*. *Id*.

2. The Deliberate Indifference Standard Is Met Here Because The Proposed Amended Complaint Alleges That The District Attorneys And Public Defenders Knew Or Should Have Known Of The Unconstitutional Waivers Of Counsel And Guilty Pleas, But Did Nothing

Under § 1983, the municipal policy, custom or practice identified by the plaintiff must amount to deliberate indifference to the rights of people with whom the officials come into contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). This typically requires proof of a pattern of underlying constitutional violations. *Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000). Deliberate indifference is established if the policymaker was aware of the unlawful conduct and acquiesced in the long-standing policy or custom. *Simmons v. City of Phila.*, 947 F.2d 1042, 1064 (3d Cir. 1991) (plurality); *Beck*, 89 F.3d at 972. In *Beck*, the Third Circuit found that five citizen complaints of an officer's excessive use of force in less than five years, all of a similar nature, were sufficient for a jury to infer that the chief and his department knew or should have known of the officer's violent propensity. *Beck*, 89 F.3d at 973.

The "deliberate indifference" standard is easily satisfied here. As alleged in the proposed Amended Complaint, assistant district attorneys and public defenders

witnessed and participated in thousands of constitutional violations in Ciavarella's courtroom over five years – without objection (PAC ¶ 728); their superiors, the district attorney and the public defender, had to have been aware of this conduct. The proposed Amended Complaint also alleges that these same public defenders and district attorneys were aware of Ciavarella's 2001 reversal for an identical constitutional violation (*see* PAC ¶ 189). *See supra* note 8. The only conclusion under these circumstances is that the district attorney and public defender – and their offices – "were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and . . . this failure, at least in part, led to [Plaintiffs'] injury." *Beck*, 89 F.3d at 972 (quoting *Bielevicz*, 915 F.2d at 851).

The district attorney and public defender knew or should have known of their subordinates' routine acquiescence and complicity in unconstitutional waivers of counsel and guilty pleas. Moreover, the remedies for preventing them were clear – object, or refuse to participate until the juvenile had either been offered a proper colloquy such that a waiver or admission would be constitutionally knowing and intelligent or proceed to trial. Municipal liability is properly pled because of the allegations that the district attorneys and public defenders "deliberately chose not to pursue these alternatives or acquiesced in a longstanding policy or custom of inaction in this regard." *Simmons*, 947 F.2d at 1064; *see also Pembaur*, 475 U.S. at 483-84.

B. The Proposed Amended Complaint Sufficiently Pleads A Plausible Nexus Between The County's Acquiescence In Unconstitutional Waivers of Counsel And Guilty Pleas And Plaintiffs' Injuries

To establish municipal liability, "a plaintiff must demonstrate a 'plausible nexus' or 'affirmative link' between the municipality's custom and the specific deprivation of constitutional rights at issue." *Bielevicz*, 915 F.2d at 850; *see also Brown v. Muhlenberg Twp.*, 269 F.3d 205, 214 (3d Cir. 2001) (explaining that there must be a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation"). Luzerne misconstrues this requirement by arguing that "any alleged observations by assistant district attorneys and public defenders of Judge Ciavarella's courtroom procedures did not directly *cause him* to deprive Plaintiffs of their Constitutional rights." (Luz. Br. 27.)

The policy, custom or practice asserted in Count VIII is not that Luzerne officials *caused* Ciavarella to deny Plaintiffs' constitutional rights, but that these officials' routine complicity with and acquiescence in Ciavarella's unconstitutional conduct constitutes a "plausible nexus," "affirmative link" and "direct causal link" with that conduct for which the County must be held accountable. (PAC ¶ 824.) Put simply, the deliberate indifference of the district attorney and public defender made possible – indeed, was essential to – the continuous denial of constitutional rights over five years.

Anela is again on point. The Third Circuit found a causal nexus there because the constitutional violation occurred as a result of Wildwood's policy to follow the judge's unlawful bail schedule instead of the state criminal practice rules. *See Anela*, 790 F.2d at 1067; *Talbert v. Kelly*, 799 F.2d 62, 68 n.3 (3d Cir. 1986).[9] Luzerne cannot claim ignorance of thousands of constitutional violations in Ciavarella's courtroom because just as "[p]rivate citizens are presumed to know the law . . . no less should be expected of public officials." *Anela*, 790 F.2d at 1067 (citation omitted) (rejecting argument that officials should not be liable because they did not know judge's bail schedule was illegal). In contrast to the fact situation in *Talbert*, Wildwood's liability was not "predicated upon the single act of [unlawful conduct] but upon a settled practice or policy of the City's decisionmakers." *See id.* at 1067 n.4. As in *Wildwood*, Luzerne had a responsibility to "correctly inform itself of its legal duty" to the public involved. *Id*.

Addressing the causation issue, the Third Circuit has held that a "sufficiently close causal link between . . . a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made

[9] In contrast, the court declined to find a nexus supporting § 1983 liability in *Talbert* because the constitutional violation was due to a deviation from the city's policy and was a one-incident violation. 799 F.2d at 68 n.3.

reasonably probable by permitted continuation of the custom." *Bielevicz*, 915 F.2d at 851 (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987)); *Beck*, 89 F.3d at 974-75 (describing code of silence and failure to take disciplinary actions as policies for which city may be liable, despite policymaker's lack of actual knowledge). The policy, custom or practice of acquiescence by the district attorney and public defender, fully alleged in the proposed Amended Complaint to be part of the constitutional violations in Ciavarella's courtroom (*see* PAC ¶ 728), easily meets that test. If the district attorney and public defender had not acquiesced, but rather had insisted upon adherence to constitutional mandates or simply objected to the constitutional violations, it is inconceivable that Ciavarella's conduct would have continued unabated for five years. Prompt objection by the other participants in the closed courtroom proceedings would have ended that conduct years ago. (*See* PAC ¶ 722.)

Luzerne's claim that it "was not in a position where it came into contact with or exercised supervision over the procedures used in the courtroom" that effectuated the constitutional deprivations (Luz. Br. 27-28) completely misses the point. Plaintiffs do not seek to "hold [the] county responsible for a state court judge's courtroom practices" (*id.* at 28), but rather to hold Luzerne accountable for its own practices, undertaken by its district attorney and public defender, which independently deprived Plaintiffs of due process by, *inter alia*, allowing

Ciavarella's conduct to proceed unabated. The injury to Plaintiffs – unconstitutional waiver of counsel and guilty pleas – "occur[ed] as a result of the implementation of [Luzerne's] program" of failing to uphold the law regarding the due process rights of juveniles. *See Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 51 (3d Cir. 1985).

Luzerne's further argument that the "state court judge has sole authority over the procedures in the courtroom" and that no one could "constitutionally or procedurally have any superior authority over Judge Ciavarella" (Luz. Br. 23) is also flawed. A district attorney has an independent "responsibility [as] a minister of justice and not simply that of an advocate . . . [that] carries with it specific obligations to see that the defendant is accorded procedural justice." Pa. R. Prof'l Conduct 3.8 cmt. 1. The Pennsylvania Rules of Professional Conduct dictate "Special Responsibilities of a Prosecutor," including making "reasonable efforts to assure that the accused has been advised of the right to . . . obtain[] counsel and has been given reasonable opportunity to obtain counsel" and "not seek[ing] to obtain from an unrepresented accused a waiver of important pretrial rights." Pa. R. Prof'l Conduct 3.8(b)-(c). As alleged in the proposed Amended Complaint, the district attorney had a policy, custom and practice of violating these sacred obligations.

Further, there are areas where the district attorney does have formal, affirmative authority over proceedings in juvenile court. Pennsylvania's Juvenile

Act affords the district attorney "veto power" over consent decrees. *See* 42 Pa. Cons. Stat. § 6340(b); Pa. R. Juv. Ct. P. 371; *In re Bosket*, 590 A.2d 774, 777 (Pa. Super. Ct. 1991) (recognizing the "legislature's clear intention to *require* the Commonwealth's consent to the imposition of pre-adjudicatory probation" (emphasis added)). Pennsylvania recognizes the Commonwealth as a "party" to juvenile proceedings, Pa. R. Juv. Ct. P. 120, whose agreement is required before an admission, *i.e.*, guilty plea, may be tendered to the court, Pa. R. Juv. Ct. P. 407. The determination of a knowing and voluntary admission requires eliciting information regarding any "factual basis for the admission" and a juvenile's understanding of the allegations and the right to a hearing. *Id*. Had the district attorney properly refused to be a party to these unlawful consent decrees or admissions, Ciavarella would have been statutorily required to reject them and conduct adjudicatory hearings. Wholesale constitutional violations would have been avoided. (*See* PAC ¶ 722.)

Finally, this Court need not make a full determination of causation at this early stage of the litigation. As long as the causal link is not too tenuous – a standard easily met here – the question whether the policy proximately caused the constitutional infringement should be left to the jury. *Bielevicz*, 915 F.2d at 851.

C. The County Is Liable For The Conduct Of Its District Attorney And Public Defender

Luzerne argues at length that the district attorney and public defender were not county policymakers and that it is therefore not liable for their conduct in formulating and implementing the unlawful policy, custom or practice alleged in the proposed Amended Complaint. (Luz. Br. 8-13.) The argument is without merit.

Applying state law, *Praprotnik*, 485 U.S. at 123, a court, "[i]n order to ascertain who is a policy maker, . . . must determine which official had final, unreviewable discretion to make a decision or take action." *McGreevy v. Stroup*, 413 F.3d 359, 369 (3d Cir. 2006) (quoting *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996)). As set forth below, both the district attorney and the public defender easily meet that test.

1. The District Attorney Acted As A County Policymaker In Adopting The Policy, Custom Or Practice That Deprived Youth Of Their Rights To Counsel And To A Knowing, Intelligent, And Voluntary Guilty Plea

Under Pennsylvania law, the district attorney acted as a county – *not* state – official in adopting the policy, custom or practice that deprived thousands of youth of their right to counsel and a knowing, intelligent, and voluntary guilty plea. In *Carter v. City of Philadelphia*, 181 F.3d 339, 342 (3d Cir. 1999), the Third Circuit, after analyzing Pennsylvania law, held that a district attorney's office is *not* an arm

of the state for purposes of Eleventh Amendment sovereign immunity. Application of the factors held to be centrally relevant by the United States Supreme Court in *McMillian v. Monroe County*, 520 U.S. 781, 784-85 (1987) – *i.e.*, the state constitution, state statutes, and state case precedent – demonstrates that the district attorney's office was a county actor here, as well.[10]

First, the Pennsylvania Constitution defines district attorneys as county officials. *See* Pa. Const. art. IX, § 4 ("County officers shall consist of . . . district attorneys . . . ."). The Pennsylvania Supreme Court found the provision "states in the clearest imaginable language that District Attorneys are County – not State – officers . . . and no Procrustean stretch can alter or change or nullify this clear language." *Chalfin v. Specter*, 233 A.2d 562, 565 (Pa. 1967).

Second, Pennsylvania's statutes also define district attorneys as local officials. The Commonwealth Attorney's Act of 1850 states that "the district attorney shall be the *chief law enforcement officer for the county* in which he is elected." 71 Pa. Cons. Stat. § 732-206 (emphasis added). Since the Act's adoption, "local district attorneys have been elected and funded by their counties."

[10] In determining whether the Monroe County sheriff acted as a final decision-maker for the county, *McMillian* also analyzed the particular function involved. 526 U.S. at 785-86. As discussed below, here the district attorney, acting administratively and in his policy-making capacity, exercised final decision-making powers for the County – not the state – in his blanket acquiescence to the violation of the constitutional rights of thousands of Luzerne youth.

Carter, 181 F.3d at 349. Pennsylvania's County Code lists the district attorney among county elected officials. 16 Pa. Cons. Stat. § 401(a)(11). County salary boards determine how many assistants a district attorney may appoint and set the assistants' salaries. 16 Pa. Cons. Stat. § 1420(a). Counties pay, out of their general funds, "[a]ll necessary expenses incurred by the district attorney or his assistants or any office directed by him." 16 Pa. Cons. Stat. § 1403.

Finally, Pennsylvania case law defines district attorneys as local rather than state officials. *See Carter*, 181 F.3d at 350 ("Pennsylvania's case law defines district attorneys . . . as local, and expressly *not* state, officials."). The Pennsylvania Supreme Court's finding in *Chalfin* that it is "crystal clear" that district attorneys are county officials, 233 A.2d at 565, is echoed in numerous other cases. *See, e.g.*, *Sands v. McCormick*, 502 F.3d 263, 273 (3d Cir. 2007) (holding that a district attorney's actions fell within the Pennsylvania Political Subdivision Tort Claims Act, which protects "local agencies" from certain damages actions); *Schroeck v. Pa. State Police*, 362 A.2d 486, 490 (Pa. Commw. Ct. 1976) ("District attorneys and their assistants are officers of the counties in which they are elected and not officers of the Commonwealth.").

Additionally, *McMillian*, in concluding that Alabama sheriffs represent the state and not the county in the execution of their law enforcement duties, found it particularly significant that Alabama statutes gave the governor and attorney

general – not the county commissioners – direct control over how the sheriff fulfilled those duties. 520 U.S. at 791. The "control" factor cuts precisely the other way in this case. The Third Circuit has found that "the [Pennsylvania] Attorney General (the "AG") is without authority to replace a district attorney . . . and in Pennsylvania, unlike many other jurisdictions, the AG has no inherent authority to supersede a district attorney's decisions generally." *See Carter*, 181 F.3d at 353.

Carter found that the district attorney's relative autonomy "underscores the DA's role as final policymaker in law enforcement issues." *Id.* at 354 n.46. Moreover, issues of "day-to-day management of the county prosecutor's office" are not "within the purview of the Attorney General's control." *Id.* at 354 (quoting *Coleman v. Kaye*, 87 F.3d 1491, 1502 (3d Cir. 1996)). Unlike the Alabama sheriffs, therefore, Pennsylvania district attorneys are independent from state control, particularly in their control and management of their offices.

Luzerne's further argument that it should not be liable because "[t]here is no provision of the County Code that grants the Commissioners or Luzerne County the power to supervise or regulate the conduct of . . . the District Attorney" (Luz. Br. 15)[11] has been flatly rejected. In *Morgan v. Rossi*, No. 96-1536, 1998 WL

[11] Luzerne's assertion that it "can only act through its Commissioners . . ." (Luz. Br. 7) is erroneous. For example, in *Barry v. Luzerne County*, 447 F. Supp.
(continued...)

175604 at *12 (E.D. Pa. Apr. 15, 1998), a county claimed that it could not be held liable for the actions of a sheriff because it contended it had no control over the sheriff's decisions. The court disagreed:

> *McMillian* does not ask whether either the County or the State has a policy that plaintiff claims violated his constitutional rights or whether the County or State had control over the action alleged to have violated plaintiff's constitutional rights. Rather, it asks whether the policymaker's actions that are alleged to form the basis for plaintiff's claim are more fairly attributable to the State or to the County based on state law.

Id.

In *Carter*, the Third Circuit appropriately viewed the identical "lack of control" argument as supporting, rather than undermining, plaintiffs' position.

> [T]he asserted autonomy from the City actually supports Carter's position with respect to the "failure to state a claim,"…as it underscores the DA's role as final policymaker on law enforcement issues for the City.

181 F. 3d at 353, n.46 (citations omitted); *see also Brady v. Fort Bend County*, 145 F.3d 691, 702 (5th Cir. 1998) ("[T]he fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in

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(continued...)

2d 438, 451 (M.D. Pa. 2006), the district court for the Middle District of Pennsylvania held that the Prison Board could bind the county for purposes of § 1983 liability, thus necessarily finding that Luzerne could act through the Prison Board.

filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area.").

Faced with the precedents discussed above, Luzerne's reliance on the district court's holding in *Williams v. Fedor*, 69 F. Supp. 2d 649 (M.D. Pa. 1999), *aff'd without opinion*, 211 F.3d 1263 (3d Cir. 2000), for the proposition that a district attorney does not act as a county policymaker (*see* Luz. Br. 9-11) is entirely unwarranted. Even putting aside the fact that this Court is, of course, not bound by that holding,[12] *Williams* is plainly distinguishable. *Williams* held that Monroe County was not liable for three isolated, prosecutorial acts committed in an individual prosecution. *Id*. at 663. The court found that, because the attorney general exercised more oversight over the district attorney's law enforcement decisions than did the county, the county could not be held liable for the district attorney's prosecutorial decisions. *Id.* at 661.

Plaintiffs' claims here are sharply distinguishable because they involve a widespread policy, custom or practice affecting thousands of cases over a five-year

[12] The Third Circuit's affirmance in *Williams* has no precedential value. *See DiGiacomo v. Teamsters Pension Trust Fund of Phila. & Vicinity*, 420 F.3d 220, 224 (3d Cir. 2005) (explaining that an affirmance without opinion "has no precedential value").

period, not a specific decision in an individual prosecution.[13] The *Williams* court itself noted that, in *Carter*, the dispositive issue as to claims against a district attorney's office was whether the claims arise from "'administrative and policy making – rather than prosecutorial – functions.'" 69 F. Supp. 2d at 661 (quoting *Carter*, 181 F.3d at 342).[14] According to the Third Circuit, other states have similarly recognized that "making and applying county-wide policy differs from carrying out state-wide policy and they have, therefore, repeatedly differentiated between administrative and prosecutorial functions, generally finding the former to be local and the latter to be state." *Carter*, 181 F.3d at 351.

Here, the action alleged by Plaintiffs is the district attorney's widespread *county* – not state – policy, custom or practice of failing to protect the constitutional rights of thousands of juveniles over a five-year period. These are not individual prosecutorial decisions, but rather represent a blanket policy, custom or practice applied across the board to all children who appeared before Ciavarella

[13] *Tavenner v. Shaffer*, No. 96-1536, 2008 WL 4861982, at *8 (M.D. Pa. Nov. 6, 2008), relied on *Williams* in determining that, because the district attorney's alleged actions – using illegally obtained evidence and failing to approve a warrant – were prosecutorial, they were not attributable to the county. *Tavenner*, like *Williams*, involved discrete prosecutorial acts in an individual case, not a policy, custom or practice implemented by the district attorney's office in thousands of cases.

[14] *Carter* did not reach the issue of whether a district attorney's prosecutorial acts represent official policy of a county. *See Carter*, 181 F.3d at 342.

during the period. This conduct is both "administrative and policy making" and, as such, is properly attributable to Luzerne, not the state.[15] *See, e.g., Carter*, 181 F.3d at 352 (finding "instructive" a Second Circuit case holding a county liable for the "district attorney's management of the office – in particular the decision not to supervise or train ADAs").[16]

Finally, the Third Circuit has "recognized that, presumably by virtue of their egregiousness, some acts fall wholly outside the prosecutorial role no matter when or where they are committed." *Odd v. Smith*, 538 F.3d 202, 211 (3d Cir. 2008). Luzerne's policy, custom or practice of failing to challenge the five-year course of blatant due process violations in Ciavarella's courtroom is sufficiently egregious to

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[15] *Williams* held that "a failure to train/supervise claim can be asserted against a county based upon a district attorney's management of his or her office." 69 F. Supp. 2d at 663. (Plaintiffs are not currently aware of the training practices of the district attorney's office. If discovery reveals a failure to provide sufficient training, Plaintiffs may, of course, seek to amend their complaint.)

[16] In its motion to dismiss, Luzerne argued that it is "[i]mmune" from § 1983 liability by virtue of, *inter alia*, the absolute immunity of the district attorney. (*See* Luz. Mot. Dismiss 10, 12-13, 18-19; *see also* Luz. Br. 28-29.) The argument is without merit. A county cannot claim immunity on the basis that the alleged policymaker would be immune if sued in his individual capacity. In *Aitchison v. Fireman's Fund Insurance Co.*, the Third Circuit held that the mayor and borough attorney were absolutely immune for their "legislative" acts, but found that the borough itself was not absolutely immune because of the immunity of its policymakers. 708 F.2d 96 (3d Cir. 1983). It explained that "liability against the municipality is not precluded simply because the defendants were found immune in their individual capacities." *Id.* at 100. Analogously, Luzerne is not "immune" from liability because its district attorney might enjoy absolute immunity if sued in his individual capacity.

fall "wholly outside the prosecutorial role." Indeed, the district attorneys' acquiescence contributed significantly to the Star Chamber quality of Ciavarella's courtroom (*see* Pls.' Resp. to Ciavarella & Conahan Mot. Dismiss 53-61). Just as Ciavarella ceased functioning as a "judge," the district attorneys completely abandoned their duties and roles as prosecutors and were effectively operating outside the law.

2. Luzerne Is Liable For The Conduct Of Its Public Defender

Plaintiffs allege that the public defender acquiesced in the denial of basic constitutional rights to thousands of juveniles in Ciavarella's courtroom. (PAC ¶ 728.) Rather than standing mute, the public defenders had a legal and ethical obligation to ensure that Plaintiffs' constitutional rights were protected. *See generally* Patricia Puritz *et al.*, Am. Bar Ass'n Juvenile Justice Ctr., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995).

Luzerne argues broadly that a county cannot be liable for the actions or inactions of a public defender. (*See* Luz. Br. 12.) Taking a more nuanced approach, the United States Supreme Court, however, has stated that "whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing." *Georgia v. McCollum*, 505 U.S. 42, 54 (1992). While the Supreme Court in *Polk County v. Dodson* found that an

individual attorney employed by the county public defender's office did not act under color of state law in her representation of the defendant, the Court acknowledged that there are situations in which a public defender may act under color of state law, stating "we do not suggest that a public defender never acts in that role." 454 U.S. 312, 324-25 (1981). Specifically, *Polk* noted that a public defender may act under color of state law while performing "certain administrative and possibly investigative functions." *Id*. at 325. For example, it is clear that a public defender acts under color of state law when making hiring and firing decisions. *See Branti v. Finkel*, 445 U.S. 507 (1980).

Lower courts have interpreted *Polk*'s recognition that public defenders can act under color of state law as encompassing actions well beyond traditional administrative tasks such as hiring. For instance, the Sixth Circuit did not "read *Polk County* to mean that in using the term 'administrative,' the Supreme Court meant to limit a finding of state action only to managerial tasks . . . different in kind from the traditional functions of a lawyer representing a client." *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 612 (6th Cir. 2007). Such a reading would lead to the absurd result that a "public-defender agency . . . acquiesced to a custom of refusing to cross-examine the State's witnesses would be immune to § 1983 liability – notwithstanding the obvious unconstitutionality of

such a policy or custom – because cross-examining witnesses falls within the 'traditional functions' of a lawyer." *Id.* at 612-13.

The absurd hypothetical in *Powers* is strikingly similar to the facts here. A finding that failing to challenge constitutionally defective guilty pleas for five years is not "under color of state law" would be no less absurd – and arguably more so – than a finding that acquiescing in a custom of refusing to cross-examine witnesses is not "under color of state law." Finding that systemic violations carry the "imprimatur of administrative approval," *Powers* held that public defenders could be considered state actors based on an alleged "agency-wide policy or custom of routinely ignoring the issue of indigency in the context of non-payment of fines." *Id.* at 612. The same analysis is fully applicable to the public defenders' conduct here.

Moreover, as distinguished from *Polk*, the claims here do not involve public defender conduct in a role adverse to the state; to the contrary, the claims involve public defender conduct adverse to their own clients. "[U]nder current Supreme Court jurisprudence, absent a role inherently adverse to the state, a state employee acts under color of state law when he abuses the position given to him by the state." *Forbes v. Rhode Island Bhd. of Corr. Officers*, 923 F. Supp. 315, 322 (D.R.I. 1996). In *West v. Atkins*, 487 U.S. 42 (1988), the Supreme Court revisited its *Polk* holding in reasoning that a physician under contract with the state to

provide medical services to state prison hospital inmates acted under color of state law for purposes of 1983 liability. *West* found *Polk* distinguishable because "a physician's obligation to make independent medical judgments [does] not set him in conflict with the State." *Id.* at 51.[17]

Plaintiffs allege that public defenders stood mute for five years as guilty pleas, which met *none* of the requirements of either the Constitution or state law, were extracted from their clients. Worse than failing to serve in an adversarial role, the public defenders facilitated and enabled unconstitutional adjudications by doing *absolutely nothing*. Since the public defenders were not acting as the "state's adversary," *Polk* does not preclude a finding that they were acting under color of state law. *West,* 487 U.S. at 50.

IV. THE PROPOSED AMENDMENTS REGARDING PACC'S LEASE WITH THE COUNTY SHOULD NOT BE STRICKEN

Luzerne argues that Plaintiffs' allegations describing the lease between it and PACC, and a 2004 state audit of that lease, must be stricken as "impertinent and scandalous." (Luz. Br. 29-31 (citing PAC ¶¶ 657-97).) The argument is without merit.

[17] *Polk* discussed that "it is the function of the public defender to enter 'not guilty' pleas, [and] move to suppress State's evidence. All of these are adversarial functions." 454 U.S. at 320 (internal citation omitted).

The standard for striking allegations is high. Motions to strike should be denied "unless the allegations *have no possible relation to the controversy* and may cause prejudice to one of the parties, or if the allegations confuse the issues." *Krisa v. Equitable Life Assurance Soc'y*, 109 F. Supp. 2d 316, 319 (M.D. Pa. 2000) (emphasis added).

Plaintiffs' challenged allegations relate to the lease between PACC and the County for the PACC facility – a central underpinning of this case. The allegations describe, *inter alia*, the closing of the River Street facility, the Luzerne County Commissioners' decision to enter the lease, the state audit of the lease, proceedings before Conahan that resulted in audit documents being kept from public view, and the audit results revealing exorbitant profits. They provide essential factual background to the claims against all Defendants and to the case in general. It cannot be argued that these allegations "have no possible relation to the controversy." They should not be stricken.

Respectfully submitted:

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