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

B.W., a minor, et al. **v.** **POWELL et al.**	**Case No. 09-cv-0286**
CONWAY et al. **v.** **CONAHAN et al.**	**Case No. 09-cv-0291**
H.T., through & with her next friend & mother, L.T., et al. **v.** **CIAVARELLA et al.**	**Case No. 09-cv-0357**
HUMANIK **v.** **CIAVARELLA et al.**	**Case No. 09-cv-0630** **The Honorable A. Richard Caputo**

ORDER

AND NOW, this ___ of _____, 2010, upon consideration of Class Plaintiffs' Second Motion for Leave to Amend the Master Complaint for Class Actions (Doc. No. 375), and Defendant Luzerne County's Response thereto, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion is DENIED. It is further ORDERED, ADJUDGED and DECREED that Class Plaintiffs' claims against Defendant Luzerne County are hereby dismissed.

BY THE COURT:

_____
Caputo, J.
United States District Court

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DEFENDANT LUZERNE COUNTY'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE TO PLAINTIFFS' SECOND MOTION FOR LEAVE TO AMEND THE MASTER COMPLAINT FOR CLASS ACTIONS

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Defendant County of Luzerne ("Luzerne County") hereby respectfully submits this Memorandum of Law in opposition to Class Plaintiffs' Second Motion for Leave to Amend the Master Complaint for Class Actions.

I. INTRODUCTION

Class Plaintiffs' most recent proposal is their fourth attempt to properly plead their claims, and their third attempt to articulate a viable claim against Luzerne County. The *second* proposed Second Amended Master Complaint for Class Actions ("Amended Class Action Complaint") merely adds irrelevant and gratuitous factual allegations that have no bearing on any potential liability as a matter of law on Luzerne County. Plaintiffs' proposed "amendments" must be denied as futile because Plaintiffs cannot state a claim against Luzerne County as a matter of law. Indeed, the United States Supreme Court specifically rejected a §1983 claim for failure "to adequately train and supervise deputy district attorneys." *Van de Kamp v. Goldstein*, __ U.S.__, 129 S. Ct. 855, 861-63, 172 L.Ed.2d 706 (2009). *Van de Kamp* is a unanimous precedential opinion.

Plaintiffs continue to seek to create a new type of broad liability under *Monell v. City of New York Department of Social Services*, 436 U.S. 658 (1978), permitting convicted criminals and even disgruntled litigants to revisit their underlying legal proceedings and obtain damages against a local municipality because of a state prosecutor's alleged failure to provide adequate legal training

and appropriate in-court supervision of assistant district attorneys.[1] In *Van de Kamp*, the United States Supreme Court rejected this §1983 claim for failure to train and supervise district attorneys because of the dangerous impact it would have on criminal prosecutions. The United States Supreme Court held that a plaintiff, who is subsequently determined to have been improperly convicted in a criminal proceeding, cannot allege a failure to train and/or supervise claim against the supervising district attorney where he cannot sue the trial prosecutor. Here, Class Plaintiffs go even beyond the plaintiff in *Van de Kamp*, and seek to impose liability upon *municipalities* for failing to train state trial prosecutors.

Luzerne County does not supervise or train state prosecutors. Additionally, *Luzerne County* did not commit any actionable conduct. As this Court reasoned at page 29 of its November 20, 2009 Opinion (Doc.335), "[t]he critical distinction in the present case is that the unconstitutional actions were *taken by the judge*, rather than by the municipal officials. Here the alleged violations were committed *by the judge*." (Emphasis by the Court.) As this Court found, Pennsylvania district attorneys are not policy-makers for the County when engaged in activities that concern state criminal prosecutions, including activities involving prosecutorial discretion. *See Wallace, et al. v. Powell, et al.*, No. 09-286, slip op. at 19-23

[1] In *Monell*, the United States Supreme Court held that local governments could only be sued under §1983 if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690.

(M.D.Pa., Nov. 20, 2009)(Doc.335).

This is the same reasoning applied by the United States Supreme Court in *Van de Kamp*. The type of training deficiencies alleged by Class Plaintiffs are not county policy because they occur, if at all, while the district attorney is engaged in activities involving legal and prosecutorial knowledge and related discretion. Thus, any decisions of the independently elected Luzerne County District Attorney concerning training for courtroom responsibilities arise out of the role of prosecutor, acting as an arm of the state, not as a final policy-maker for Luzerne County.

Moreover, the proposed amendment fails to meet the causation requirement that the Supreme Court and Third Circuit apply to *Monell* claims. Rather than establish that Luzerne County—through its allegedly insufficient training and supervision—is the direct cause of the constitutional harm, Plaintiffs' proposed Amendment Complaint establishes only that a judge, over whom Luzerne County exercises no control, was the factual, legal, and actual cause of Class Plaintiffs' alleged injuries. Thus, Plaintiffs are unable to satisfy the element of causation, which is a necessary predicate to the maintenance of any *Monell* action. Further, Plaintiffs are unable to establish that any purported lack of training manifests Luzerne County's deliberate indifference to the constitutional rights of juveniles appearing in state court.

II. CLASS PLAINTIFFS' PROPOSED FACTUAL ALLEGATIONS

Plaintiffs' latest amendment seeks, yet again, to hold Luzerne County liable for the actions of Luzerne County's District Attorney (the "District Attorney"), this time under a "failure to train and supervise" theory. (Am.Compl. ¶¶810-21.) Relying on ongoing testimony proffered before the "Interbranch Commission on Juvenile Justice," Plaintiffs allege that the District Attorney "failed to adequately train and supervise the Assistant District Attorneys," (*Id.* ¶816), and that properly trained prosecutors would have prevented some unknown percentage of the constitutional violations "that occur[ed] in the courtroom," (*Id.* ¶710).[2]

Plaintiffs allege that the need for training and supervision was "obvious." Plaintiffs, however, point to just two instances—separated by six years—where juvenile placements were reversed by the Superior Court.[3] (*Id.* ¶819.) Further,

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[2] Plaintiffs' proposed amended allegations are themselves disingenuous. Paragraph 816 of Amended Class Action Complaint incorporates by reference paragraphs 701 through 710. Paragraph 704 alleges that "In Luzerne County, the District Attorney and First District Attorney were responsible for training and supervising Assistant District Attorneys who appeared in juvenile court. (IC Tr. at 14:5-8 (Nov. 10, 2009).)" (Am.Compl. ¶704; footnote omitted.) However, the actual testimony cited therein does **not** relate to training, but merely to supervision.

[3] Contrary to Class Plaintiffs' allegations, in the 2001 case, the juvenile **was represented by counsel**. However, counsel failed to appear at the adjudicatory hearing, and left it to the juvenile and his family to request a continuance. Judge Ciavarella denied the request for a continuance. On appeal, the Superior Court held that conducting a delinquency proceeding without counsel, for a **represented juvenile** who had **not** waived his right to counsel, violated his right to counsel. *See In re A.M.*, 766 A.2d 1263 (Pa.Super,2001). Plaintiffs have repeatedly mis-

Plaintiffs acknowledge that the allegedly deficient training and supervision was not the cause of the alleged constitutional deprivations; rather, they allege that the actions of former Judge Ciavarella (over whom the prosecutors lack authority) caused the constitutional deprivations. (*Id.* ¶819.) Indeed, Plaintiffs even concede that training and supervision would not have solved the problem: Plaintiffs merely speculate that if the District Attorney provided certain unspecified training and supervision, "the deprivations of constitutional rights would likely have ceased." (*Id.* ¶708; emphasis added.)

As explained in the sections that follow, this attempt to expand *Monell* liability well-beyond its intended scope fails as a matter of law.

III. STATEMENT OF QUESTION INVOLVED

Should Luzerne County be required to continue to defend this action when Plaintiffs cannot assert any claim against it as a matter of law?

SUGGESTED ANSWER: No.

IV. ARGUMENT

In the interests of judicial economy, this Brief does not repeat Luzerne County's September 28, 2009 Response To Plaintiffs' Motion For Leave To

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cited this case and Judge Ciavarella's purported post-appeal comment, as proof that Judge Ciavarella admitted that signed written waivers violate the constitution. The question of the propriety of written waivers was not at issue in that case. It is particularly egregious that Class Counsel repeatedly mis-cite this case because the same lawyer who signed the instant Motion to Amend was counsel in *In re A.M.* and, Class Counsel all know full well what occurred.

Amend the Master Complaint for Class Actions (Doc.297). Plaintiffs, however, include in their proposed Amended Class Action Complaint the same claim (Count VIII) that this Court found to be futile in its November 20, 2009 Order (Doc.335). Plaintiffs allege that they re-plead Count VIII solely for purposes of appeal. (*See* Am.Compl. at 198, n.10.) For the reasons set forth herein, and in Luzerne County's Response To Plaintiffs' Motion For Leave To Amend the Master Complaint for Class Actions (Doc.297), and for the reasons set forth in the Court's November 20, 2009 Order (Doc.335), this Court must find Counts VIII and IX to be futile, and dismiss with prejudice all claims against Luzerne County.

A. PLAINTIFFS HAVE NOT ESTABLISHED GOOD CAUSE

This Court provided Plaintiffs with ample opportunity to file an amended complaint. The Court's May 12, 2009 Case Management Order (Doc.58) initially set May 29, 2009 as the date for Class Plaintiffs to amend their Complaint. Subsequently, the Court's June 22, 2009 Order (Doc.132) set September 10, 2009, as the deadline for amending the Master Complaint for Class Actions. More than three months after this deadline, and after this Court denied Plaintiffs leave to file an Amended Class Action Complaint, Plaintiffs filed another Motion to Amend.

Pursuant to Rule 16(b)(4), this Court's scheduling order may only be modified for "good cause" and with the Court's consent. Plaintiffs—who rely upon cases in which the respective court *precluded* further amendments—assert

that they have established "good cause" because the factual basis of their new claim was not available until after certain individuals testified in November and December 2009.

Class Plaintiffs, however, have been investigating and reinventing their claims since at least February 26, 2009, and could have easily investigated and determined whether any alleged lack of training of courtroom personnel caused the deprivation of their constitutional rights. As set forth above, certain Class Counsel were complaining about constitutional deprivations in Judge Ciavarella's courtroom ten years ago. *See In re A.M.*, 766 A.2d 1263.

Class Plaintiffs' recent proposed "failure to train" claim is frivolous, especially in light of this Court's November 20, 2009 Opinion (Doc.335), and the United States Supreme Court's 2009 unanimous decision in *Van de Kamp*.

Plaintiffs are increasing the cost of litigation to the prejudice of Luzerne County, and intentionally delaying its dismissal. Class Plaintiffs' claims are futile, and granting leave to amend will reward Plaintiffs' dilatory tactics, at the expense and prejudice of Luzerne County's taxpayers. Accordingly, the Court must dismiss Luzerne County with prejudice.

B. PLAINTIFFS' MOTION FOR LEAVE TO AMEND MUST BE DENIED PURSUANT TO THE STANDARDS OF RULE 15.

Even if this Court finds that Plaintiffs have "good cause" to circumvent this Court's Case Management Orders, Plaintiffs must still demonstrate that they have

satisfied the requirements of Rule 15.

Leave to amend is not permitted where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [or] futility of amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d.Cir.,1993)(*quoting Foman v. Davis*, 371 U.S. 178, 182 (1962)).

In the Third Circuit, the touchstone for the denial of leave to amend is undue prejudice to the non-moving party. *Pride Mobility Products Corp. v. Dylewski*, 2009WL1044608, *3 (M.D.Pa.,2009)(citing *Lorenz*, 1 F.3d at 1413-14; *Cornell & Co., Inc. v. OSHRC*, 573 F.2d 820, 823 (1978)). While Luzerne County is unduly burdened by Plaintiffs' repeated attempts at amendment, the determinative issue here is that Class Plaintiffs' proposed amendment to the Master Complaint is futile. *Id.* An amendment is futile if "the complaint, as amended, would fail to state a claim upon which relief could be granted." *Id.* (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3dCir.,1997). In making this assessment, the Court must use the same standard of legal sufficiency employed under Federal Rule of Civil Procedure 12(b)(6). *Id.*

To avoid dismissal pursuant to Rule 12(b)(6), a plaintiff must aver "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 570 (2007). A plaintiff's obligation to provide the grounds for his entitlement to relief requires more than a legal conclusion, and a formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 554; *Phillips v. Allegheny*, 515 F.3d 224, 231 (3dCir.,2008). "[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3dCir.,1997)(citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, __ U.S.__, 129 S. Ct. 1937, 1949 (2009). This standard "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly*, 550 U.S. at 556.

Here, no discovery will change the fact that local municipalities cannot be held liable for failing to train state prosecuting trial lawyers to try to catch and stop state court judges from scheming to deprive criminals of their constitutional rights in exchange for secret alleged kickbacks. *See Van de Kamp*, __ U.S.__, 129 S. Ct. at 861-63; November 20, 2009 Order at 19-23 (Doc.335). Accordingly, Plaintiffs have not satisfied Rule 15, and their Motion for Leave to Amend must be denied.

C. THE DISTRICT ATTORNEY WAS NOT ACTING AS A COUNTY POLICY-MAKER WHEN TRAINING AND SUPERVISING STATE PROSECUTORS

"To determine if the Plaintiffs articulate a claim against Luzerne County via

the proposed amendment" the Court must first determine whether the District Attorney "had final policy-making authority for Luzerne County" with respect to the policies alleged to have led to the deprivation of Plaintiffs' constitutional rights. November 20, 2009 Order (Doc.335) at 11. *See also Monell*, 436 U.S. at 690. In this Court's November 20, 2009 Order, this Court determined that Pennsylvania district attorneys enjoy "'dual or hybrid status sometimes as a state officer and sometimes as a county officer.'" November 20, 2009 Order (Doc.335) at 20 (analyzing *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997).

This Court concluded that Pennsylvania district attorneys act on behalf of the Commonwealth of Pennsylvania when they act in their "prosecutorial" capacities, and they act on behalf of a particular county when acting in their "administrative" capacities (i.e., when making hiring, firing, and other related decisions). *Id.* at 20-21. Thus, "the status of the district attorney as a state or county official hinges on whether the actions alleged were prosecutorial or administrative in nature." *Id.* at 21.

Accordingly, the issue before the Court is whether the District Attorney's alleged failure to provide adequate training and supervision occurred in his prosecutorial or in his administrative capacities.

The United States Supreme Court recently answered this precise question in *Van de Kamp*, 129 S.Ct. at 861-63, holding that the failure to train and supervise

assistant district attorneys occurs in the district attorney's prosecutorial or quasi-prosecutorial capacity. In *Van de Kamp*, the Supreme Court squarely addressed the question of whether a district attorney's failure to provide certain legal training to assistant district attorneys was "prosecutorial" or "administrative" for purposes of absolute prosecutorial immunity. *Id.* at 861-63 (reminding that prosecutors enjoy absolute individual immunity for prosecutorial acts, but only qualified immunity for administrative acts).

In *Van de Kamp*, the plaintiff had been convicted of murder in 1980. In 1998, he filed a habeas corpus petition. He claimed that his conviction depended in critical part upon the testimony of a jailhouse informant, which was unreliable, and that the informant had previously received reduced sentences for providing prosecutors with favorable testimony in other cases. Plaintiff alleged that at least some prosecutors in the Los Angeles County District Attorney's Office knew about the favorable treatment; that the office had not provided Plaintiff's attorney with that information; and that the prosecution's failure to provide Goldstein's attorney with this potential impeachment information led to his erroneous conviction. *Id.* at 859.

After an evidentiary hearing on the habeas corpus petition, the District Court ordered the State to grant the petitioner a new trial or to release him. The Court of Appeals affirmed, and the State decided that, rather than retry the petitioner, who

had already served 24 years of his sentence, it would release him. Upon his release, he filed a §1983 claim against the former district attorney and the chief deputy district attorney for failing to adequately "train and to supervise the prosecutors who worked for them as well as their failure to establish an information system about informants." *Id.*

The United States Supreme Court reasoned that the plaintiff's §1983 claims for failure to train and supervise are prosecutorial–not administrative in nature:

> …We agree with Goldstein that, in making these claims, he attacks the office's administrative procedures. We are also willing to assume with Goldstein, but purely for argument's sake, that *Giglio* imposes certain obligations as to training, supervision, or information-system management.
>
> Even so, we conclude that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. **Those claims focus upon a certain kind of administrative obligation-a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in the training or the supervision or the information-system**

> **management. And in that sense also Goldstein's claims are unlike claims of, say, unlawful discrimination in hiring employees.** Given these features of the case before us, we believe absolute immunity must follow.

Id. 861-622 (emphases added). [4]

The United States Supreme Court unanimously held that the alleged failure to train and supervise did not occur in the district attorneys' traditional administrative capacity. *Id.*

Here, as in *Van de Kamp*, Plaintiffs' proposed allegations attack training and supervision decisions involving "legal knowledge and the exercise of related discretion." *Id.* Plaintiffs allege that the District Attorney failed to provide training that would prepare assistant district attorneys to identify and remedy certain constitutional issues while appearing before the Juvenile Court. (*See* Am.Compl. ¶¶816-17.) Similarly, Plaintiffs allege that the District Attorney failed to supervise the assistant district attorneys while they appeared in Juvenile Court. (*Id.* ¶820.)

These are precisely the same claims alleged in *Van de Kamp* that concern legal decision-making and trial prosecutorial decisions in court. *See Van de Kamp*,

[4] The distinction between "administrative" and "prosecutorial" actions in the absolute immunity context derives from *Imbler v. Pachtman*, 424 U.S. 409 (1976). As explained by this Court in its November 20, 2009 Order (Doc.335), the relevance of this distinction derives from the "hybrid" nature of Pennsylvania district attorneys.

129 S. Ct. at 862. Thus, as in *Van de Kamp*, Plaintiffs' allegations attack actions of the district attorney that were "directly connected with the conduct of a trial." *Van de Kamp*, 129 S. Ct. at 862. **Class Plaintiffs themselves repeatedly plead that their claims are based upon courtroom conduct in every paragraph of Count IX.** (Am.Compl., ¶¶814-821.) As this Court held, a municipality cannot be liable for courtroom conduct. *See* November 20, 2009 Order at 19-23 (Doc.335). *See also Tavenner v. Shaffe*, 2008WL4861982, 3 (M.D.Pa.,2008); *Williams v. Fedor*, 69 F.Supp.2d 649, 660 (M.D.Pa.,1999).[5]

Class Plaintiffs buried this critical United States Supreme Court unanimous decision in a footnote on page 15 of their Brief. Plaintiffs argue that *Van de Kamp* is distinguishable merely because it involved absolute immunity. This argument misses the mark entirely: the question before this Court is whether the district attorney acts in an administrative or prosecutorial capacity concerning legal training for its trial prosecutors. Thus, the dispositive question here is the exact same question addressed by the highest court in *Van de Kamp*, and already determined by this Court at pages 19-23 of its November 20, 2009 Order (Doc.335).

[5] Class Plaintiffs grossly mis-cite *Williams* at p.16 of their Brief. *Williams* held **the opposite** of what Class Plaintiffs argue. In *Williams*, the Court held that the plaintiff failed to establish §1983 claim against a county based on a prosecutor's failure to train/supervise his subordinates. Significantly, the District Court also decided *Williams* ten (10) years before the Supreme Court published *Van de Kamp*.

Plaintiffs' argument would permit plaintiffs—regardless of the true nature of their claims—to style their Complaints as "failure to train" claims, thereby eviscerating the distinction between prosecutorial acts and administrative acts. *Van de Kamp*, 129 S. Ct. at 863 (reasoning that "[m]ost important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate" the prosecutorial/administrative distinction necessary to determine the applicability of absolute immunity). Such a result directly contradicts the "hybrid" nature of Pennsylvania district attorneys and would improperly expand municipal liability.

Indeed, numerous courts have recognized that a determination as to whether a district attorney was acting in a prosecutorial or administrative capacity for purposes of absolute liability is co-extensive with the same determination in the *Monell* context where—as is the case here—a state's prosecutor enjoys "hybrid" status. *See Whitfield v. City of Philadelphia*, 587 F.Supp.2d 657, 667 n.15 (E.D.Pa.,2008); *Tavenner*, 2008WL4861982, *3-4.

In *Whitfield*, after finding that the individual district attorney was acting in her prosecutorial capacity (and, therefore, entitled to absolute immunity), the Court reasoned that "just as this determination defeats the claims against the individual defendants, so too must the claims against the City of Philadelphia fail." *See*

Whitfield, 587 F.Supp.2d at 672 (reasoning that the district attorney's alleged "failure to instruct, teach, or otherwise direct their subordinates to avoid violations of the Constitution in pursing the appeal of an illegal sentence on technical procedural grounds...cannot fairly be called 'administrative'").

Likewise, in *Tavenner*, the court reasoned that Pennsylvania district attorneys act "as a representative for the commonwealth when making prosecutorial as opposed to administrative decisions." *Id.* at *3 (engaging in *McMillian* analysis and citing *Williams*, 69 F.Supp.2d at 660). To determine in what capacity the district attorney was operating, the Court analyzed the law governing prosecutorial immunity, ultimately finding that "the alleged actions of [the] District Attorney...[were] completely prosecutorial." *Id.* *See also id.* *4-5. This Court also rendered the same holding in this case in its November 20, 2009 Order (Doc.335), at 22 (relying on *Tavenner* to determine whether actions at issue were prosecutorial or administrative).

Moreover, both this Court and the Third Circuit have indicated that cases addressing the administrative/prosecutorial distinction in the absolute immunity context are directly applicable in the *Monell* context. In its recent opinion in this case, this Court properly relied on absolute immunity case law when determining whether the District Attorney was acting in his administrative or prosecutorial capacity under the facts alleged at that time. *See* November 20, 2009 Order

(Doc.335), at 22 (citing and relying on *Imbler* and *Davis v. Grusemeyer*, 996 F.2d 617, 629 (3dCir.,1993), which are both absolute immunity cases). Similarly, in a recent non-precedential opinion, the Third Circuit applied *Van de Kamp* to determine whether a county is liable for the failure to train district attorneys. *See Hyatt v. County of Passaic*, 2009WL2055136, *2 (3dCir.,2009).

In *Hyatt*, the Third Circuit recently reasoned:

> Under New Jersey law, when county prosecutors and their subordinates perform law enforcement and prosecutorial functions, they act as agents of the State, and the State must indemnify a judgment arising from their conduct. The County is liable however, when prosecutorial defendants perform administrative tasks unrelated to their strictly prosecutorial functions, such as personnel decisions. **Training and policy decisions that require legal knowledge and discretion are related to prosecutorial functions and are unlike administrative tasks concerning personnel.**

Hyatt, 2009WL2055136, at *2(emphasis added)(citing and applying *Van de Kamp*).

Plaintiffs ask this Court to ignore *Van de Kamp*, which is the highest binding precedent applicable to the precise (and narrow) question before this Court. Curiously, while Plaintiffs attempt to downplay the significance of *Van de Kamp*, because they argue it involved the absolute immunity, Plaintiffs rely solely on *Carter v. City of Philadelphia*, 181 F.3d 339 (1999), where the Third Circuit addressed the distinction between administrative and prosecutorial capacities to

determine the applicability of *the Eleventh Amendment. See id.* at 350.

Unlike *Van de Kamp*, and unlike the much more recent Third Circuit decision in *Hyatt*, *Carter* is factually and legally distinct from this case: *Carter* did **not** involve the training of assistant district attorneys. It involved district attorneys providing legal advice to police officers, an activity that the Supreme Court has previously held to be administrative in nature. *See Burns v. Reed*, 500 U.S. 478 (1991).

Significantly, in the 1999 *Carter* decision, the Third Circuit expressly relied upon the Supreme Court's 1991 decision in *Burns*. *Carter*, 181 F.3d at 355. In *Van de Kamp*, almost twenty (20) years of jurisprudence after *Burns*, the United States Supreme Court fully analyzed *Burns* and held that district attorneys act as state trial prosecutors in failure to train claims. *Van de Kamp*, 129 S.Ct at 861-62.

Even prior to *Van de Kamp* and *Hyatt*, in *Whitfield*, the District Court observed the limited nature of *Carter*:

> In *Carter*, the Third Circuit undertook a functional analysis of a prosecutor's implemented policy concerning police investigations and concluded that the specific policies at issue related to 'training, supervision and discipline" [of police] and not "whether and how to prosecute violations of state law....Notably, the underlying policies at issue in *Carter* related to police investigations, conduct that the Supreme Court had previously held to have been outside the scope of prosecutorial immunity....*Carter* did not provide an avenue through which plaintiffs can render inapplicable the absolute protection enjoyed by prosecutors, simply by

> pleading a claim for failure to train, supervise and discipline.

Whitfield, 587 F.Supp.2d at 667 n.15 (concluding that Plaintiffs' reliance on *Carter* for the proposition that "policies relating to training, supervision and discipline are administrative rather than prosecutorial" was misplaced and "too broad" a reading of *Carter*)(emphasis added). *See also* this Court's November 20, 2009 Order (Doc.335), at 21 (recognizing that *Carter* involved only "the failure to train or supervise police officers from procuring 'perjurious eyewitnesses'" (emphasis added)).

As explained by the District Court in *Whitfield*, Plaintiffs' attempt to extend *Carter* to apply to all situations where plaintiffs characterize their claims as involving the "failure to train" ignores the factual and legal contexts at issue in *Carter*, and expands *Carter* beyond both its intended reach and the bounds of applicable Supreme Court precedent. *Whitfield*, 587 F.Supp.2d at 667 n.15.

In fact, by clinging to *Carter* and downplaying *Van de Kamp*, Plaintiffs ask this Court to conclude that, for purposes of absolute immunity, the District Attorney acted in his prosecutorial capacity, but for purposes of *Monell* liability, the **same** District Attorney engaged in the **same** action (or inaction), acted in his administrative capacity. Plaintiffs do not (and cannot) provide any legal basis for such an unbalanced and absurd result. *Cf. Van de Kamp*, 129 S. Ct. at 863 (holding that absolute immunity extends to supervising attorneys because to hold otherwise

would result in "practical anomalies").

Based on this Court's findings in its November 20, 2009 Order (Doc.335), and based upon binding United States Supreme Court precedent, the District Attorney's actions were in a prosecutorial capacity and thus on behalf of the Commonwealth. Therefore, Plaintiffs are unable to establish that the District Attorneys were final policy-makers for Luzerne County. As a consequence, Plaintiffs' claims against Luzerne County fail as a matter of law, and permitting the proposed amendment would be futile.

D. PLAINTIFFS' CLAIMS ARE FUTILE BECAUSE PLAINTIFFS CANNOT ESTABLISH THAT THE ALLEGED FAILURE TO TRAIN AND SUPERVISE WAS THE "MOVING FORCE" BEHIND THE ALLEGED CONSTITUTIONAL DEPRIVATIONS.

Even if this Court were to disagree with the unanimous bench of the presiding United States Supreme Court, Plaintiffs' proposed amendment is futile because they cannot establish the elements of causation or culpability. "Establishing municipal liability on a failure to train claim under §1983 is difficult. A plaintiff pressing a §1983 claim must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3dCir.,1997). Specifically, a plaintiff

asserting a "failure to train claim against a municipality must demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged.'" *Id.* (quoting *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997). To establish that the municipality was the "moving force" behind the alleged violations, a plaintiff must demonstrate that "the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bryan County*, 520 U.S. at 404.

Here, Class Plaintiffs do not plead this causal nexus. To the contrary, they plead that "the deprivations of constitutional rights would likely have ceased." (Am.Compl., ¶708; emphasis added.) Moreover, deliberate indifference is an impossibility because the Pennsylvania Supreme Court determines legal training, and as Plaintiffs repeatedly plead, the alleged scheme by Judge Ciavarella was **in secret**. (*E.g.*, Am.Compl., ¶¶666-68.)

1. Plaintiffs Cannot Establish That Luzerne County Was The Direct Cause Of The Alleged Constitutional Deprivations

To satisfy the causation requirement for a claim under 42 U.S.C. §1983, Plaintiffs must establish that the alleged failure to train and supervise is the "direct cause" of the constitutional harm. *Bryan County*, 520 U.S. at 404. *See also Monell*, 436 U.S. at 690-95; *Jett v. Dallas Indp. Sch. Dist.*, 491 U.S. 701, 735 (1989); *McCaa v. Easterling*, 2009WL2762645, *3 (N.D.Tex.,2009)(connection

between municipal action and constitutional harm must be "more than a mere 'but for' coupling" and that "[t]he deficiency in training must be the actual cause of the constitutional violation" (emphasis added)). When evaluating this heightened causation standard, the court must "carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Bryan County*, 520 U.S. at 410.

Here, Plaintiffs cannot demonstrate that Luzerne County's alleged training deficiencies were the "but for" cause of the alleged deprivations, let alone that these alleged deficiencies were the direct or actual cause. Indeed, Plaintiffs specifically pleaded that a state judge—over whom the municipality and the District Attorney have no power—was the direct and proximate cause of the alleged injuries. (*E.g.*, Am.Compl., ¶2.) *See also* this Court's November 20, 2009 Opinion (Doc.335) at 29 ("[t]he critical distinction in the present case is that the unconstitutional actions were *taken by the judge*, rather than by the municipal officials. Here the alleged violations were committed *by the judge*.") Plaintiffs' inability to establish causation suffers from a fatal flaw: they cannot show that the person who is alleged to have needed the training is the same person who effectuated the deprivation of their constitutional rights.

Any alleged shortcoming in training and supervision of prosecutors did not cause Judge Ciavarella to deprive Plaintiffs of their Constitutional rights. *See Polk*

County v. Dodson, 454 U.S. 312, 326 (1981). Unlike typical (and cognizable) failure to train and supervise claims, Plaintiffs in this case do **not** allege that the individuals who allegedly required training were the same individuals that actually *caused* the constitutional harm. *See* the Court's November 20, 2009 Order (Doc.335) at 28 ("Unlike conduct committed by municipal police officers, over whom the county would have authority, here there was no formal ability to stop Ciavarella.").

As this Court reasoned, at most, the alleged training failures "created an environment in which corruption could grow. Even this does not establish a direct causal link as required." *Id.* at 26. Without an affirmative link between the actions giving rise to the alleged deprivation and a governmental plan or policy, Plaintiffs cannot meet the requirements for a claim. *Id. See also Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Hill v. Borough of Kutztown*, 455 F.3d 225, 245 (3dCir.,2006)("There cannot be an award of damages against a municipal corporation based on the actions of one of its officers when in fact the officer inflicted no constitutional harm." (internal quotations and alterations omitted)).

Throughout their proposed Amended Complaint, Plaintiffs repeatedly acknowledge their inability to establish causation. For example, Plaintiffs aver that "constitutional violations occur[ed] in Ciavarella's courtroom," (Am.Compl. ¶706.), that unconstitutional procedures were implemented by Judge Ciavarella and

were "accepted" by prosecutors, (*id.*), and that prosecutors "ignored the routine deprivation of Plaintiffs' constitutional rights," which occurred at the hands of Judge Ciavarella, (*id.* ¶708). These allegations confirm that Judge Ciavarella, not Luzerne County, was the direct cause of the alleged harm. [6]

Moreover, Plaintiffs admit that the alleged training, even if implemented, would not have eliminated the ongoing constitutional violations. Specifically, Plaintiffs merely speculate that implementing such training might reduce the likelihood of further constitutional harm by some unspecified percentage. (Am.Compl. ¶708.) The fact that neither Luzerne County nor the District Attorney could prevent the alleged constitutional violations further bolsters the conclusion that they were not the direct cause. *See, e.g.*, *Reitz*, 125 F.3d at 145 (holding that plaintiff had not alleged facts sufficient to establish that alleged failure to train prosecutors "was the actual cause" of the alleged injuries); *McCaa*, 2009WL2762645, at *4-5 (dismissing *Monell* claim because plaintiff failed to establish causation); *cf. Woloszyn v. County of Lawrence*, 396 F.3d 314, 325 (3dCir.,2005)(reasoning that failing to identify "specific training that could reasonably have" prevented the alleged constitutional deprivation was fatal to

[6] Plaintiffs' claim is still, in essence, a "ratification" argument. This Court already rejected this theory as a basis for liability under Plaintiffs' previously proposed amended complaint. (Doc.335.) Additionally, ratification as a theory of §1983 liability only pertains when a **subordinate's** decision is subject to review by a municipality's authorized policymakers. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Here, the decisions were made by the judge.

Monell "failure to train" claim).

Plaintiffs' inability to establish causation is not simply a matter of inartful pleading; rather, the lack of causation derives from the separation of powers established in the Pennsylvania Constitution. As explained at length in Defendant's previous Memorandum, (*see* Doc.297 at 14-17), there is no provision of the County Code that grants the Commissioners or Luzerne County the power to supervise or regulate the conduct of judicial officers, the District Attorney, or those of any other County Row Office. Likewise, by statute, the District Attorney is responsible for supervising the employees of her Office, *see* 16 P.S. §1420, not elected judges. *See Jefferson County Court Appointed Employees Assn. v. Pa. Labor Relations Board*, 2009WL5066914, *6-7 (Pa.,2009)(reminding that pursuant to statute, the judiciary branch possesses the power to "hire, fire, and supervise its employees" and that other branches of government, including municipal governments, "may not encroach upon this judicial power").

To the contrary, Pennsylvania's Constitution establishes the court system as a separate branch of government. *See County Of Allegheny v. Commonwealth of Pennsylvania*, 517 Pa. 65, 534 A.2d 760 (1988). Only Pennsylvania's Supreme Court, established in the Constitution as the state's highest court, has the power to exercise general supervisory and administrative authority over the courts. Const., Art. V, §10. Thus, Luzerne County and the District Attorney have no supervisory

authority over state court judges. *Kremer v. State Ethics Comm'n*, 503 Pa. 358, 361, 469 A.2d 593, 595 (1983); *see also Blake v. Papadakos*, 953 F.2d 68, 70 (3dCir.,1992).

Accordingly, even though Plaintiffs *speculate* that the District Attorney *might* have prevented a portion of the alleged deprivations, in reality, the District Attorney had no such power.

To adopt Plaintiffs' proposed causation standard would expand *Monell* liability well beyond its intended bounds, eliminate the element of causation, and permit plaintiffs to recover taxpayers' money due to the actions of third parties over whom the municipalities exercise no authority. Thus, even if this Court were to disagree with the sitting unanimous United States Supreme Court, this Court must still find that Class Plaintiffs' amendment is futile because it does not (and cannot) establish the causal link necessary to maintain a *Monell* claim against Luzerne County.

2. Plaintiffs Cannot Establish That Luzerne County Was Deliberately Indifferent To The Alleged Constitutional Deprivations

To meet the deliberate indifference standard, the alleged failure to train must reflect a deliberate or conscious choice made by a policymaker for the County. *City of Canton, Ohio v. Harris*, 489 U.S. 278, 389 (1989). It is not sufficient merely to show that a particular lawyer acted improperly or that better training

would have enabled a lawyer to avoid the particular conduct causing injury, which is exactly what Class Plaintiffs speculate. *See Berg v. County of Allegheny*, 219 F.3d 261, 276 (3dCir.,2000); *Garcia v. County of Bucks*, 155 F.Supp.2d 259, 269 (E.D.Pa.,2001); *see also Gabrielle v. City of Plain*, 202 F3d 741,745 (5thCir.,2000). Significantly, in the "failure to train and supervise" context, the plaintiff must meet a heightened degree of culpability to maintain a *Monell* claim. *See City of Canton*, 489 U.S. at 392. [7]

Plaintiffs must establish that the "need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifference to the need." *Id.* at 390; *see also id.* at 392 (reasoning that permitting cases against cities…on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*"). "A showing of simple or even heightened negligence will not suffice."

[7] In *City of Canton*, the Court made it clear that plaintiffs must identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of any alleged constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, or that there was negligent administration of an otherwise adequate program, or that the conduct resulting in the injury could have been avoided by more or better training. The Court noted that federal courts are not to become involved "in an endless exercise of second guessing municipal employee training programs." *City of Canton*, 489 U.S. 390-91.

Bryan County, 520 U.S. at 407. [8]

Because Judge Ciavarella acted outside of Luzerne County's control, Plaintiffs are unable, as a matter of fact and of law, to establish that the type of training for assistant district attorneys was "likely to result in the violation of constitutional rights." November 20, 2009 Order (Doc.335), at 28 (discussing deliberate indifference and reasoning that "Ciavarella was a state, not county, employee over whom the Luzerne County final policy-makers had no control" and that "[e]ven if the county wanted to stop the conduct, it had no ability to do so directly"). As this Court succinctly reasoned, "[t]o create liability there must be deliberate indifference to the conduct of an individual over whom there is control or responsibility." *Id.*

Thus, Plaintiffs are unable to plead deliberate indifference to the constitutional rights of others by Luzerne County. As a consequence, Plaintiffs cannot plead a "failure to train and supervise" claim as a matter of law. Accordingly, this Court must deny Plaintiffs' Motion because the proposed

[8] Plaintiffs' deliberate indifference argument relies on two adjudications separated by six years, one in 2001 and one in 2007, which were reversed on appeal because the juvenile at issue was not represented by counsel at the hearing. (Am.Compl.¶819.) Two reversals, separated by six years, do not demonstrate that the need for training is "so obvious" or that continued constitutional violations are "likely to result." To the contrary, any state appellate reversals merely reflect the normal state court judicial process. Plaintiffs' allegation is absurd that two (2) reversals in six (6) years should put a local municipality, or even the District Attorney, on notice that *extra-judicial* training of assistant district attorneys (who cannot control the judge's actions) was necessary.

amendment is futile.

3. As A Matter Of Law, Luzerne County Cannot Be Liable For A Failure To Train Claim Because The Supreme Court Of Pennsylvania Is The Only Entity Responsible For Training Attorneys

As Set forth above, and as this Court ruled in its November 20, 2009 Order (Doc.335), Luzerne County cannot be liable for constitutional deprivations by a judge over whom it has no control. Additionally, Luzerne County cannot, as a matter of law, be held responsible for the failure to train assistant district attorneys because the Supreme Court of Pennsylvania—not Luzerne County—is the only entity charged with training attorneys in this Commonwealth.

The Pennsylvania Supreme Court is the exclusive source of training, supervision, and discipline of Pennsylvania attorneys:

> The constitution of this Commonwealth has exclusively granted to the Supreme Court of Pennsylvania the power to regulate the practice of law before all the courts of Pennsylvania. Pa. Const. art. V, §10. In particular, subsection (c) of Article V, section 10 provides:
>
> > (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts...and for admission to the bar and to practice law....
>
> Pa. Const. art. V, § 10(c). To help administer admission to the bar, the Supreme Court has created the Pennsylvania Board of Law Examiners, which, among other things, establishes standards for admission to the bar. Pa. B.A.R. 104. The Supreme Court has also adopted the Code of Professional Conduct in order to govern the

> conduct of those individuals privileged to practice law in this Commonwealth. Additionally, to assure that lawyers admitted to practice in the Commonwealth continue their education to have and maintain the requisite knowledge and skill necessary to fulfill their professional responsibilities, the Pennsylvania Supreme Court has adopted the Pennsylvania Rules for Continuing Legal Education. Pa.R.C.L.E. 102.

See Kohlman v. Western Pa. Hospital, 652 A.2d 849 (Pa.Super.Ct.,1994); *see also* 42 Pa.Con.Stat. §725(4)-(5)(granting Supreme Court exclusive jurisdiction of appeals "from final orders" issued by "[t]he agency vested with the power to admit or recommend the admission of person to the bar and the practice of law" and "[t]he agency vested with the power to discipline or recommend the discipline of attorneys at law"); The Disciplinary Board of the Supreme Court of Pennsylvania, *http*://www.padisciplinaryboard.org/aboutus/structure_general.php.

The power to require training and administer discipline resides with the Supreme Court. Pa. Const. art. V, §10; 42 Pa.Con.Stat. §725(4)-(5). Consequently, even if the alleged lack of training could have been the direct cause of the constitutional harm—which it cannot—Luzerne County cannot serve as the target of a civil rights action, because it has no power to mandate or implement training of lawyers. Plaintiffs are attacking Luzerne County for failing to take action that, pursuant to the Pennsylvania Constitution, it has no power to take.

Significantly, in promulgating the Rules of Juvenile Court Procedures, the Pennsylvania Supreme Court did not provide for **any** role for prosecutors in the

administration of the assignment of defense counsel, the conveyance of information regarding the right to counsel, or the obtaining of a waiver of the right to counsel. Instead, it conceived of and devised this obligation as the exclusive province of the courts and the probation officers working for and under the supervision of the courts. 42 Pa.C.S.A. §6304. *See also* Luzerne County's September 28, 2009 Memorandum at 8-9, n.2 (Doc.297).

Had the Supreme Court determined it was warranted to give *the prosecution* responsibility for protecting the rights of offenders, it would have included such an obligation in the Rules. Furthermore, the Pennsylvania Supreme Court, as the only entity responsible for prescribing the requirements for legal competence and legal training, is the only entity that can require assistant district attorneys assigned to Juvenile Court to receive specialized training. Indeed, the Juvenile Court Judges Commission sponsors elaborate training **which it limits to court staff**.[9] Despite that this Juvenile Court Judges Commission is responsible for "establishing standards governing the administrative practices and judicial procedures used in juvenile courts," it directs no efforts to the education or training of assistant district attorneys.[10]

The fact that an attorney's qualifications and training are established by the

[9] *See, e.g,* http://guest.cvent.com/EVENTS/Info/Agenda.aspx?e=d9e99a40-5659-43ea-9c95-b2ef992a0ab3.

[10] *See* http://www.jcjc.state.pa.us/portal/server.pt/community/about_jcjc/5984.

Supreme Court, not any legislative body, and certainly not a county, prohibits a claim against a local municipality for lack of training or supervision of lawyers' in-court conduct.

Class Plaintiffs ask this Court to create federal liability against a county for the alleged shortcomings of the state judicial system. This is not supported by case law, and directly contravenes well-settled notions of federalism and comity. Accordingly, this Court must deny Plaintiffs' Motion because the proposed amendment is futile.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Leave to File an Amendment must be denied. Despite repeated efforts to manufacture a claim against Luzerne County, Plaintiffs' proposed claims fail as a matter of law. Consequently, the proposed amendment is futile.

Respectfully submitted,

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Dated: January 22, 2010

CERTIFICATE OF COMPLIANCE

I, Timothy T. Myers, Esquire hereby certify that this Brief complies with word limit allowed in conference by the Honorable A. Richard Caputo. The Brief contains 7428 words of text, excluding captions, tables and certifications, as counted by the word-processing software system used to prepare this Brief.

/s Timothy T. Myers
Timothy T. Myers

CERTIFICATE OF SERVICE

I, Timothy T. Myers, Esquire, hereby certify that on this date all counsel of record were served with the forgoing pursuant to the electronic service provisions of this Court. I further certify that the following were served by U. S. mail, first class, postage pre-paid.

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