No. 14-457

In the Supreme Court of the United States

ROBERT KING,

Petitioner,

v.

WADE MCCREE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Since 1871, this Court has held that judges are immune from civil liability for their judicial actions, even if they act maliciously or corruptly. The petitioner filed a § 1983 action against a judge who had an undisclosed affair with the complaining witness in a felony proceeding against the petitioner. The lower courts correctly held that this action was barred by judicial-immunity law. Should this Court grant certiorari to change judicial-immunity law?

2. The petitioner claims that there is a "split" among federal courts on the application of the judicial-immunity doctrine to § 1983 claims. He cites three cases: the Sixth Circuit Court of Appeals' opinion below, another Sixth Circuit opinion, and an unpublished opinion from a federal district court in Pennsylvania. These cases are consistent with each other. The Pennsylvania case applies a "setting-in-motion" theory that is inapplicable to the petitioner's allegations. Has the petitioner demonstrated a split of authority that warrants this Court's review?

3. The petitioner argues that this Court should grant a writ of certiorari to review the application of *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009), to §1983 claims. He admits that no other federal court has addressed this issue yet. Should this Court be the first federal court to examine *Caperton*'s application to § 1983 claims?

4. The petitioner argues that there is confusion among lower courts about whether to apply the "functional

approach" to immunity in cases involving prosecutors and social workers. This case involves judicial immunity, not prosecutorial or other forms of immunity. Every supposedly conflicting case that the petitioner cites applies the functional approach. Should this Court grant certiorari to review the application of the functional approach to forms of immunity that do not involve judges?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE

A. The underlying felony proceedings

Robert King and Geniene La'Shay Mott are the biological parents of a minor. King failed to make necessary child-support payments "over a period of years." Pet. App. 35. Eventually, the State of Michigan filed a felony non-support case against him. *Id.* (citing *Michigan v. King,* Wayne County Circuit Court Case No. 12-3141).

King's felony case was assigned to former Wayne County Circuit Court judge Wade McCree. Pet. App. 36. After King's arraignment and preliminary examination in March 2012, McCree presided over a May 2012 pretrial hearing. *Id.* Geniene Mott attended that hearing. *Id.* King "pleaded guilty to failure to pay child support" and, "[i]n exchange, [he] was placed on a 'delayed sentence' under Michigan's Penal Code." *Id.* (citing Mich. Comp. Laws § 771.1(2)).

McCree did not know Mott before the May 2012 hearing. He saw her in attendance the day of the hearing and spoke to her afterwards. Pet. App. 36. Later, after King entered his plea, McCree and Mott began an intimate relationship that lasted for several months. During the course of their relationship, Mott and McCree discussed ways to obtain outstanding child-support payments from King, including the possibility of incarcerating or tethering him. Some of the relevant texts were reproduced in the Michigan Supreme Court's opinion removing McCree from judicial office. *In re McCree,* 495 Mich. 51, 845 N.W.2d 458 (2014).

Michigan's Judicial Tenure Commission was investigating McCree at the time for "having texted a photograph of himself without a shirt to a female deputy sheriff and telling a reporter in response to questions about his actions that 'there is no shame in my game.'" *Id.* at 460. McCree acknowledged these proceedings in an email to Mott and noted that their relationship could subject him to further scrutiny. *Id.*

McCree did not notify King about his relationship with Mott. Nor did he recuse himself when King returned for a case-review hearing in August 2012. By that time, King had failed to satisfy his payment obligations under the delayed sentence and was $672 in arrears. Pet. App. 37.

At the August 2012 hearing, McCree ordered King to be placed on a tether until he made the necessary child-support payments. *Id.* Four days later, King paid the amount due and his tether was removed. *Id.* About a month later, McCree arranged for King's case to be transferred to another Wayne County Circuit Court judge.

King alleged that he learned of the relationship between McCree and Mott in December 2012. The Michigan Supreme Court later found that McCree engaged in judicial misconduct based on the actions described above and removed him from office. *McCree*, 845 N.W.2d 458. It also issued a conditional six-year suspension that would have become effective if McCree had been reelected in November 2014. *Id.*

B. Proceedings before the District Court

In February 2013, King filed this action against McCree and Mott in the United States District Court

for the Eastern District of Michigan. He alleged that McCree and Mott violated his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution and sought damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

In lieu of an answer, McCree filed a motion to dismiss King's claims under Federal Rule of Civil Procedure 12(b)(6). The district court granted this motion on July 26, 2013. Pet. App. 34-49.

The district court accepted all of the allegations in King's complaint as true when evaluating McCree's motion to dismiss. Applying this Court's judicial-immunity caselaw, it held that King could overcome McCree's absolute judicial immunity only in two cases: (a) for "actions not taken in [his] judicial capacity" and (b) for actions "taken in the complete absence of all jurisdiction." Pet. App. 40. Because King did not argue that McCree lacked jurisdiction, the district court's analysis focused on whether the actions at issue were taken in McCree's judicial capacity.

King's complaint, according to the district court, alleged "only three actions taken by McCree that directly involved King:

1. On May 21 2012, McCree accepted King's guilty plea, designated a payment plan and approved a delayed sentence;

2. On August 16, 2012, McCree placed King on a tether because of his failure to abide by the payment plan; and

3. On September 18, 2012 McCree recused himself from King's case; the case was transferred to another judge.

Pet. App. 42-43. Each of these acts was judicial in nature and was therefore subject to absolute judicial immunity. Pet. App. 43.

King argued that McCree was liable under § 1983 for non-judicial acts like "flirt[ing]" with Mott, engaging in sexual intercourse, texting, and giving Mott money. Pet. App. 40-41. But the district court observed that "none of the acts [King] complains of involved McCree dealing with *him*; they involved *McCree and Mott*." Pet. App. 41 (emphasis added). King's allegations therefore failed to state a claim: "King's §1983 claims cannot, as a matter of law, be based on actions taken by McCree that did not directly involve King." *Id.*

The district court added that, even if these allegations somehow involved King, they were not taken when McCree was acting "under color of state law" and therefore did not support a claim under § 1983. Pet. App. 42.

The district court also held that King failed to state a valid conspiracy claim under 42 U.S.C. §1985. Pet. App. 48. It rejected King's assertion that McCree and Mott conspired to deprive him of his constitutional rights based on his "gender and status as a father" as "not plausible." *Id.*

C. The Sixth Circuit's opinion

King appealed the district court's disposition of his § 1983 claim to the Sixth Circuit Court of Appeals. In his brief on appeal, King conceded that he did not

dispute "McCree's rulings from the bench." Resp. App. 52 ("Plaintiff does not argue that McCree lacked jurisdiction nor does he challenge McCree's rulings from the bench.").

After hearing oral argument in June 2014, the Court of Appeals issued an opinion affirming the district court's judgment. Judge Boggs wrote for the majority, joined by Judge McKeague. Pet. App. 1. Judge Cole wrote a concurring opinion. Pet. App. 30.

The Court described McCree's conduct in detail, then turned to the application of this Court's judicial-immunity caselaw. Pet. App. 16. It agreed with the district court's conclusion that only the three acts listed above—the May 2012 delayed-sentence agreement (which occurred before McCree and Mott began their relationship), the August 2012 tethering, and the September 2012 transfer—involved King directly. Pet. App. 21. Because McCree had not begun his relationship with Mott before the May 2012 hearing, only the August and September 2012 actions were at issue. Both of these actions, however, were judicial in nature. Pet. App. 22. The Court of Appeals concluded, therefore, that they were subject to judicial immunity.

The Court of Appeals was unpersuaded by King's contention that McCree's actions were not subject to judicial immunity because they were tainted by off-the-bench conduct. The Court of Appeals' conclusion was rooted in *Stump v. Sparkman,* 435 U.S. 349 (1978), where this Court held that "[a] judge will not be deprived of immunity because the action he took … was done maliciously." Pet. App. 23 (quoting *Stump,* 435 U.S. at 356).

The Court of Appeals was also unpersuaded by King's allegation that McCree's affair with Mott violated his due-process rights, even apart from its impact on the judicial proceedings. McCree and Mott's intimate relationship, the majority noted, "did not directly involve King." Pet. App. 24. An action under section 1983 "is entirely personal to the direct victim of the alleged constitutional tort." Pet. App. 24 (citing *Claybrook v. Birchwell,* 199 F.3d 350, 357 (6th Cir. 2000)). Therefore, "these acts could not, without more on Judge McCree's part, deprive King of due process." Pet. App. 24. Indeed, the Court of Appeals noted that "King can point to no case supporting his claim that Judge McCree's relationship with Mott, in itself, amounted to a constitutional tort against King." Pet. App. 25.

The majority acknowledged that "[a] fair trial in a fair tribunal is a basic requirement of due process," and that "fairness … requires an absence of actual bias in the trial of cases." Pet. App. 25 (citing *In re Murchison,* 349 U.S. 133, 136 (1955)). But that requirement, the majority explained, "extends to what occurs *in trials and tribunals*…" Pet. App. 25 (emphasis in original). Thus, the majority declined to create a new rule to fit King's case: "We hold that a defendant cannot avoid the bar of judicial immunity by relying on non-judicial, out-of-court acts that may have affected in-court, judicial acts. Judicial bias alone of a judge—when not serving in a judicial function—does not create a due-process violation." Pet. App. 25.

The majority noted that dissenting opinions in *Bradley v. Fisher,* 80 U.S. 335 (1871), *Stump, Mireles v. Waco,* 502 U.S. 9 (1991), and *Kalina v. Fletcher*, 522

U.S. 118 (1997), expressed a preference for narrowing the scope of immunity.[1] But tasked as it was with applying "the law of the one supreme Court," the Court of Appeals concluded that King's claims failed under well-established law: "The Supreme Court's judicial-immunity doctrine has remained undisturbed for decades. Under existing Supreme Court law, Judge McCree is immune from suit under the doctrine of judicial immunity." Pet. App. 30.

Judge Cole's concurrence stated that the Court of Appeals was "constrained by precedent to grant immunity," but that its opinion *should not be read as an endorsement of McCree's conduct or as the court "going out of [its] way to protect one of [its] own.*" Pet. App. 31 (emphasis added). He "applaud[ed]" the Michigan Supreme Court for removing McCree but stated that "the majority opinion properly and persuasively concludes that [McCree's] misconduct does

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[1] The majority's reference to Justice Scalia's dissent in *Kalina* is misplaced for two reasons. First, Justice Scalia (joined by Justice Thomas) states that the "functional approach" to immunity is "so deeply embedded in [the Court's] §1983 jurisprudence" that it should not be changed. *Kalina,* 522 U.S. at 135 (Scalia, J., dissenting). Thus, while Justice Scalia's *Kalina* dissent questions the evolution of prosecutorial-immunity law, it also states that *stare decisis* requires the Court to adhere to current law. Second, Justice Scalia's dissenting opinion focuses on *prosecutorial* immunity. *Id.* at 131-135 (Scalia, J., dissenting). Although Justice Scalia notes that the "functional" approach has produced "some curious inversions of the common law as it existed in 1871, when §1983 was enacted[,]" his opinion does not state that current *judicial*-immunity law is among them. *Id.* at 132 (Scalia, J., dissenting).

not fit within one of the narrow exceptions to absolute judicial immunity." Pet. App. 32.

REASONS FOR DENYING THE WRIT

Since this Court adopted the doctrine of judicial immunity in 1871 in *Bradley*, plaintiffs have been barred from pursuing civil actions against judges based on their judicial actions. This rule applies no matter how shocking the allegations against a judge or how badly the judge is alleged to have acted. *See Dennis v. Sparks,* 449 U.S. 24, 28 (1980) (holding that judicial immunity applied where a judge issued an order in exchange for a monetary bribe). The district court and the Sixth Circuit Court of Appeals applied this well-established law correctly when they held that King's § 1983 claims were barred by the doctrine of judicial immunity.

King attempted to avoid this doctrine by focusing on private actions that occurred between McCree and Mott—flirtation, intercourse, private conversations, and the like. But this effort was to no avail. In the Sixth Circuit Court of Appeals' words, "[A] defendant cannot avoid the bar of judicial immunity by relying on non-judicial, out-of-court acts that may have affected in-court, judicial acts."[2] Pet. App. 25. This conclusion follows directly from cases like *Bradley* and *Stump*, which hold that judicial immunity applies even when a judge acts maliciously or corruptly.

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[2] King did not allege that McCree's judicial acts in August and September 2012 were legally erroneous or inconsistent with how McCree handled similar cases. *See* Resp. App. 52 (stating that King does not contest "McCree's rulings from the bench").

That is not to say that judges can violate ethical rules with impunity. Judges entitled to immunity under *Bradley* and its descendants can be impeached or removed, just as McCree was removed by the Michigan Supreme Court. This Court's jurisprudence establishes, however, that King's attempt to impose civil liability fails as a matter of law.

King's petition offers four arguments in an attempt to justify a writ of certiorari. None has merit.

First, he argues that "federal courts" have "wrongly extended" the doctrine of judicial immunity as stated in *Stump*. The only example he offers of this supposed extension is *this case*. And far from "extending" *Stump,* the Sixth Circuit Court of Appeals applied that case faithfully. King advocates a new approach, one in which a judge's alleged motives and off-the-bench conduct are relevant to the application of the judicial-immunity doctrine. This proposal is unsound and contrary to the policies underlying over a century of judicial-immunity jurisprudence.

Second, King contends that federal courts are "split" about the application of judicial immunity to § 1983 claims. The evidence of this split, according to King, consists of this case, another Sixth Circuit Court of Appeals opinion, and an unpublished opinion from a federal district court in Pennsylvania. These cases do not establish the kind of circuit split that warrants certiorari. They are not inconsistent with one another, and the district court case applies a "setting-in-motion" theory that is inapplicable here.

Third, King notes that no federal court has considered how *Caperton v. A.T. Massey Coal Co., Inc.,*

556 U.S. 868 (2009), applies to §1983 claims and argues that this Court should resolve this issue. As Supreme Court Rule 10 suggests, however, this Court does not grant certiorari to paint on a blank canvas. It should not reach this legal issue until lower courts have an opportunity to address it. Moreover, even if the Court were inclined to address the issue, it should not do so in this case. The non-judicial acts that King cites were not "under color of law" and therefore do not support a § 1983 claim.

Finally, King cites a supposed conflict about the "functional approach" to immunity in cases involving prosecutors and social workers. But this case involves a judge, not a prosecutor or social worker. And the "conflict" described in King's fourth argument is illusory; every case he cites applies the functional approach to immunity.

Therefore, King has not justified certiorari and his petition for a writ of certiorari should be denied.

I. *Stump* has not been "wrongly extended."

In his first argument for certiorari, King argues that "federal courts have wrongly extended judicial immunity beyond that contemplated in *Stump* to protect judges from civil liability even where the judge's admitted non-judicial conduct violated the due process rights of the accused." Petition at 15. He contends, in other words, that certiorari is warranted because lower courts' judicial-immunity jurisprudence has become unmoored from *Stump*.

As an initial matter, King provides no support for his assertion that federal *courts* have strayed from *Stump*. He cites only one example of this supposed

drift: *this case*. *See* Petition at 15-20. But the Sixth Circuit Court of Appeals' decision is not erroneous. As shown below, its decision is consistent with *Stump* and compelled by this Court's judicial-immunity jurisprudence. And even if the Sixth Circuit Court of Appeals did err, a single error does not justify certiorari.

A. *Bradley* and *Stump*.

Stump was built on the foundation laid a century earlier by *Bradley*. In *Bradley,* this Court adopted the doctrine of judicial immunity, holding that judges cannot be subject to civil liability for judicial acts, "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Bradley,* 80 U.S. at 347.

The Court explained that this rule is necessary to ensure that judges are free to decide cases based on law and conscience, without fear of reprisal: "[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347.

The Court did not craft this rule anew in *Bradley*. The doctrine of judicial immunity originated in English common law, where it was "the settled doctrine … for many centuries[.]" *Id.* And it was adopted without question by America's earliest courts. *Id.* (explaining that the doctrine "has never been denied, that we are aware of, in the courts of this country"). *Id.* Indeed, the *Bradley* court noted that this rule is present "in all

countries where there is any wellordered system of jurisprudence." *Id.*

In adopting this rule, the *Bradley* court dismissed the notion that its application should depend on the motivation behind judicial acts. *Id.* at 347-348 (holding that judicial immunity cannot be "affected by the motives with which … judicial acts are performed"). Thus, the Court held that judicial immunity applies even when a judge acts for improper reasons. *Id.* at 347-348 (citing Sir Edward Coke's 1608 opinion in *Floyd and Barker*).

The Court knew, of course, that this doctrine would protect all judges, both good and bad, from liability for judicial acts. But it reasoned that this price was necessary. Unless judicial immunity protects incorrupt and corrupt judges alike, it has little practical value. *Id.* at 348.

After all, parties who are disappointed in court often "vent" their disappointment by accusing judges of harboring improper motives. *Id.* at 348. That, the Court reasoned, was an inevitable part of human nature. *Id.* As such, the doctrine of judicial immunity offers meaningful protection only if it is impervious to allegations of malice and corruption. *Id. See also id*. at 354 ("[T]he exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives can always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence.").

Bradley's expansive view of judicial immunity did not grant judges impunity to act with corruption or malice. Instead, the Court recognized that the proper remedy for corruption or other improper influences in judging lay in impeachment and removal from office: "If in the exercise of the powers with which they are clothed as ministers of Justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office." *Id.* at 350.

This Court applied this rule a century later in *Stump*. There, the plaintiff sought to impose civil liability on a judge who ordered her sterilization, unbeknownst to her, when she was fifteen years-old. This order, according to the plaintiff, was part of a conspiracy with her parents. *Stump,* 435 U.S. at 354. The *Stump* court followed *Bradley* and held that the plaintiff's claims were barred by judicial immunity.

After determining that the sterilization order was within Judge Stump's jurisdiction, the Court considered whether the order was a "judicial act." *Id.* at 360. It held that, to determine whether an act was judicial in nature, courts must consider "the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge, and … the expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity." *Id.* at 362. Because Judge Stump "performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge," the Court concluded that he acted in a judicial capacity. *Id.*

The Court rejected the argument that judicial immunity should depend on how awful or offensive the consequences of a judge's actions are. The respondent in *Stump* argued that the judge's action "was 'so unfair' and 'so totally devoid of judicial concern for the interests and well-being of the young girl involved' as to disqualify it as a judicial act." *Id*. at 363. *Stump* held, however, that "[d]isagreement with the action taken by the judge… does not justify depriving that judge of his immunity." *Id*.

B. The Sixth Circuit Court of Appeals' application of judicial-immunity law

King asserts that "federal courts" have improperly expanded upon the foundation laid by *Bradley* and *Stump*. The only example he offers to support this thesis, however, is *this case*. He is mistaken. The Sixth Circuit Court of Appeals' was faithful to *Stump* and to the rest of this Court's judicial-immunity jurisprudence. Indeed, that caselaw has been clear since 1871 and the Sixth Circuit Court of Appeals expressed no trouble or confusion about applying this body of law to the facts of this case.

McCree took two actions after beginning his relationship with Mott that involved King directly: the August 2012 order tethering King and the September 2012 order transferring King's case. Pet. App. 21. The Court of Appeals correctly concluded that these were judicial acts. Ordering sanctions for criminal defendants who have not met their obligations and transferring cases are both functions ordinarily performed by judges, and King was dealing with McCree in the latter's judicial capacity in both instances. *See Stump,* 435 U.S. at 362 ("[T]he factors

determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i. e.*, whether they dealt with the judge in his judicial capacity."). Therefore, McCree cannot be subject to civil liability for these actions. *Stump,* 435 U.S. at 362-363.

King conceded below that he does not dispute "McCree's rulings from the bench." Resp. App. 52. His argument about the supposedly improper application of *Stump*, therefore, seems to focus on McCree's private, off-the-bench conduct with Mott. The Sixth Circuit Court of Appeals accurately stated the core problem with King's argument: "[A] defendant cannot avoid the bar of judicial immunity by relying on non-judicial, out-of-court acts that may have affected in-court, judicial acts." Pet. App. 25.

The Court of Appeals' conclusion follows directly from *Stump*. There, as in *Bradley*, this Court held that a judge does not lose judicial immunity when improper motives influence his or her judicial decisions. *Stump,* 435 U.S. at 356 ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority ...."). *See also Bradley,* 80 U.S. at 351 ("[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.").

The Sixth Circuit Court of Appeals' decision is also supported by this Court's 1980 decision in *Dennis,* 449 U.S. at 27. The plaintiff in *Dennis* filed a §1983 action, alleging that an injunction preventing it from

extracting minerals was the product of a conspiracy between the judge who issued it, the company that sought the injunction, and various other parties. The district court dismissed claims against the judge, concluding that judicial immunity applied "whether or not the injunction had issued as the result of a corrupt conspiracy." *Id.* at 26.

This Court held that dismissal of claims against the judge did not require dismissal of claims against the other alleged conspirators. But it also affirmed the district court's application of the judicial-immunity doctrine. *Id.* at 27 ("[A]s the case comes to us, the judge has been properly dismissed from the suit on the immunity grounds.").

If judicial immunity applies to a judge who allegedly issued an injunction in exchange for a bribe as in *Dennis*, then it applies to a judge who was involved in an intimate relationship with a complaining witness. And the Court's conclusion in *Dennis* was simply the application of *Bradley* and *Stump*'s conclusion that a judge's motivation is irrelevant to judicial immunity. *Stump,* 435 U.S. at 356; *Bradley,* 80 U.S. at 351.

King is actually advocating a new rule—one that would deprive a judge of judicial immunity whenever a plaintiff alleges that on-the-bench conduct is motivated by improper off-the-bench conduct. This Court rejected this approach to judicial immunity in *Bradley* and King offers no reason for this Court to depart from over a century of consistent judicial-immunity caselaw. *See Bradley,* 80 U.S. at 347.

The considerations that justified the adoption of the judicial-immunity doctrine in 1871 apply equally today.

It would take little imagination for an aggrieved litigant to allege that a judge's decision was motivated by an undisclosed relationship with another litigant. Allowing this kind of allegation to pierce judicial immunity would open the proverbial floodgates to civil lawsuits against judges. *See id*. at 354 ("The allegation of malicious or corrupt motives can always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence.").

The Sixth Circuit Court of Appeals' opinion is consistent with and compelled by *Stump*, *Bradley,* and their descendants. King's proposed rule is not only unsound; it strikes at the very roots of the judicial-immunity doctrine. Therefore, the Court should deny his petition for a writ of certiorari.

II. There is no "split" among federal courts on the application of judicial immunity to § 1983 actions.

King's second argument in support of his petition for certiorari is the assertion that "federal courts are divided and employ inconsistent analysis" when applying judicial immunity to §1983 claims. Petition at 20. He cites three opinions in support of this alleged division: *Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996), an unpublished opinion from the United States District Court for the Middle District of Pennsylvania, and the Sixth Circuit Court of Appeals' opinion in this case. These cases do not establish a split among federal courts. In fact, as shown below, they are not inconsistent with each other.

A. *Archie*

King apparently cites *Archie* in the belief that it is inconsistent with the Sixth Circuit Court of Appeals' disposition of this case. Even if *Archie* and this case were inconsistent, a clash between two opinions from the same circuit does not establish the kind of split that warrants certiorari. *See* Supreme Court Rule 10. And in fact, *Archie* is not inconsistent with the Sixth Circuit Court of Appeals' opinion below.

In *Archie*, a judge used the threat of interfering with the complainants' custody of their children to coerce them into having sexual relations with him. The Sixth Circuit Court of Appeals held that these alleged actions were not judicial in nature and therefore were not subject to judicial immunity: "We hold that stalking and sexually assaulting a person, no matter the circumstances, do not constitute 'judicial acts.'" *Archie,* 95 F.3d at 441.

This case is unlike *Archie* because King did not allege that McCree threatened to exercise his judicial authority *against King*. Nor is the misconduct here similar to the misconduct in *Archie*. McCree was not accused of using his judicial office to *force* a sexual relationship, like the defendant in *Archie*. Rather, McCree was accused of having a *consensual* sexual relationship that allegedly made him biased against King. These facts have more in common with the conspiracy alleged in *Dennis* than *Archie*.

Moreover, even if King had alleged an abuse of power similar to the defendant's conduct in *Archie*, he does not stand in the same position as the plaintiffs in *Archie*. Those plaintiffs were the very women who were

blackmailed into having sexual relations with a judge against their wills; King was a third-party to the consensual relationship between McCree and Mott. A plaintiff must assert that his *own* legal rights were violated. *See Powers v. Ohio,* 499 U.S. 400, 410-11 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.").

Assuming *arguendo* that McCree somehow leveraged his judicial authority to induce Mott to enter into an intimate relationship with him (which he did not do), King is not the proper plaintiff to bring that claim under *Archie*. There is no inconsistency between *Archie* and the Sixth Circuit Court of Appeals' opinion in this case and no reason to grant a writ of certiorari.

B. *Wallace* and the setting-in-motion theory

The next alleged conflict, according to King, arises from the United States District Court for the Middle District of Pennsylvania's unpublished opinion in *Wallace v. Powell* (January 9, 2014), Resp. App. 1, a decision cited by the Sixth Circuit Court of Appeals' opinion below. Pet. App. 26-28. *Wallace* addresses claims against two Pennsylvania judges who advocated for and helped to bring about the construction of a new juvenile-detention facility. These judges accepted millions of dollars in kickbacks and sentenced an alarmingly high number of juveniles to detention in the new facility. Resp. App. 10-15.

The District Court for the Middle District of Pennsylvania dismissed all claims based on the judges'

judicial actions. But it held that the plaintiffs had valid claims under §1983 for non-judicial conduct. Resp. App. 28. The court cited three categories of non-judicial acts: (1) actions that led to the closing of a detention center that competed with the new juvenile-detention center, (2) the institution of a zero-tolerance policy "that dictated instances in which probation officers had to file charges against and detain juveniles…", and (3) "additional out-of-court actions," such as initiating the construction of the new facility and concealing illicit payments. Resp. App. 24-25.

These non-judicial actions differ in an important sense from the non-judicial actions on which King's claims are based. To state a valid claim under § 1983, a plaintiff must "allege that some person has deprived him of a federal right" and "that the person who has deprived him of that right *acted under color of state or territorial law*." *Gomez v. Toledo,* 446 U.S. 635, 640 (1980) (emphasis added). Therefore, to state a §1983 action against a judge, a plaintiff must allege that the judge took *non-judicial* action *under color of law* that deprived him or her of a constitutional right.

The plaintiffs in *Wallace* were able to state §1983 claims based on the defendants' non-judicial conduct *under color of law*. Resp. App. 22-25. In contrast, King did not (and could not) allege any non-judicial actions *under color of law* that deprived him of a constitutional right. Whereas the plaintiffs in *Wallace* cited the judges' administrative actions and conduct enabled by the judges' governmental position, King cites only private acts that took place in McCree and Motts' intimate relationship—flirtation, intercourse, and similar acts. Pet. App. 40-41. These actions were not

under color of law. Consequently, the non-judicial actions in this case do not support a § 1983 claim.

King's petition attempts to cure this defect in his case by citing the "setting-in-motion" theory applied in *Wallace*—a theory that King never advanced below. This theory is inapposite to King's allegations. It is a theory of causation that imposes §1983 liability on defendants who were not directly involved in the deprivation of a constitutional right. *Wallace,* Resp. App. 26. Here, however, King alleged that McCree was *directly* involved in the alleged deprivation. Thus, the setting-in-motion test is not applicable.

Moreover, the setting-in-motion theory applies only to actions by one party that set in motion actions by *another* party that deprive the plaintiff of a constitutional right:

> [T]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts *by others* which the actor knows or reasonably should know would cause *others* to inflict the constitutional injury.

Wallace, Resp. App. 26 (citation omitted; emphasis added).[3] King's theory is that McCree's non-judicial

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[3] The cases cited in *Wallace* also refer to setting in motion *others'* violations of constitutional rights. *See Starr v. Baca,* 652 F.3d 1202, 1207 (9th Cir. 2011) (using "by others" language); *Sanchez v. Pereira-Castillo,* 590 F.3d 31, 51 (1st Cir. 2009) (same); *Sales v. Grant,* 158 F.3d 768, 776 (4th Cir. 1998) (same); *Waddell v. Forney,* 108 F.3d 889, 894 (8th Cir. 1997) (same); *Conner v. Reinhard,* 847

acts influenced McCree's *own* judicial acts. The setting-in-motion test does not apply to these facts.

For these reasons, King's assertion that there is a conflict for this Court to resolve is unfounded. The cases he cites in support of this supposed conflict are actually in harmony. And even if the Court were inclined to address the setting-in-motion theory, this case is not the vehicle for doing so. This theory does not apply to the allegations in King's complaint.

III. This Court should not be the first to analyze *Caperton's* impact on § 1983 actions.

In his third argument, King suggests that the Court should grant his petition for a writ of certiorari to consider the application of *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009), to §1983 claims.

King's petition itself demonstrates that the Court should not grant leave to consider this issue. In King's words, "[n]o federal court has considered *Caperton*'s impact on § 1983 or judicial immunity." Petition at 25. As shown by Supreme Court Rule 10, this Court typically grants certiorari only when there are decisions from lower courts to review. Although the considerations in Rule 10 are not exhaustive, every one

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F.2d 384, 396-97 (7th Cir. 1988) (same). Although *Morris v. Dearborne,* 181 F.3d 657 (5th Cir. 1999), states that a plaintiff must prove that the defendant "set in motion events that would foreseeably cause the deprivation of constitutional rights[,]" it did so while agreeing with the district court's opinion in that case. *Id.* at 672. The district court referred to causing "others" to deprive the plaintiff of a constitutional right. *Id.*

of them involves the review of lower courts' application of federal law. King's *Caperton* argument offers no lower-court decision to review, much less the kind of conflicting caselaw that would make the issue ripe for consideration by this Court.

Moreover, King has no valid § 1983 claim to which *Caperton* might apply. Any actions that involved King directly are subject to absolute judicial immunity, as shown above. And King's remaining allegations concern actions that were not "under color of law"—flirtation, sexual intercourse, and other personal matters. Pet. App. 40-41. Without an offending non-judicial action *under color of law,* there is no valid § 1983 claim for this Court to address.

For these reasons, King's third argument does not support certiorari.

IV. The Court should not grant a writ of certiorari to consider the application of the "functional approach" to prosecutors and social workers.

In his final argument for certiorari, King argues that "whether the application of immunity should focus on 'function' versus 'conduct' remains in doubt" when it comes to non-judicial actors like prosecutors and social workers. Petition at 27-28. But even if there were doubt about the functional approach to immunity for prosecutors and social workers, this case is not the right vehicle to address that issue. McCree is neither a prosecutor nor a social worker. The "conflict" posed by King's fourth issue—assuming it exists at all—is not raised by this case.

In fact, this last "conflict" is as illusory as the "conflicts" in King's first and second arguments. King argues that this Court adopted a functional approach to prosecutorial immunity in *Imbler v. Pachtman,* 424 U.S. 409 (1976), but abandoned that approach in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). He contends that this supposed conflict is also present in *Ernst v. Child and Youth Services of Chester County,* 108 F.3d 486 (3d Cir. 1997) (which uses a functional approach), and *Holloway v. Brush,* 220 F.3d 767 (6th Cir. 2000) (which, according to King, focuses on the defendant's "conduct").

Every one of these cases, without exception, uses the functional approach to immunity. In *Imbler,* the Court held: "[R]espondent's activities were intimately associated with the judicial phase of the criminal process and thus were *functions* to which the reasons for absolute immunity apply with full force." *Imbler,* 424 U.S. at 430 (emphasis added). The Court followed *Imbler* in *Buckley*. There, the Court stated that it applies the "functional approach" to immunity, "which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley,* 509 U.S. at 269 (quoting *Forrester v. White,* 484 U.S. 219, 229 (1988)). It cited *Imbler* as one of the cases in which the Court applied the functional approach. *Buckley,* 509 U.S. at 269 ("[In *Imbler,*] we focused on the functions of the prosecutor that had most often invited common-law tort actions."). There is no conflict at all between *Imbler* and *Buckley*; both applied the functional approach.

The same is true of the supposed conflict between the Third Circuit Court of Appeals' opinion in *Ernst*

and the Sixth Circuit Court of Appeals' opinion in *Holloway*. Both apply a functional approach. *Ernst* applied *Imbler* and *Buckley* to hold that the defendants were absolutely immune because "the functions [they] performed … are closely analogous to the functions performed by prosecutors in criminal proceedings …." *Ernst,* 108 F.3d at 495. Likewise, *Holloway* held that "[a]bsolute immunity is determined by a functional analysis that looks to the nature of the function performed, not the identity of the actor who performed it." *Holloway,* 220 F.3d at 774 (citations and quotations omitted). *See also id.* at 775 ("Prosecutors are not absolutely immune, however, when they perform administrative, investigative, or other functions.").

Each of the cases that King cites employs the functional approach. The use of the word "conduct" in *Buckley* and *Holloway* does not mean that this Court or the Sixth Circuit departed from the functional approach. Rather, in both instances, the opinions used the term "conduct" in determining whether the action at issue was a function to which immunity traditionally applied. *See Buckley,* 509 U.S. at 271 (explaining that *Imbler*'s functional approach focuses on the "conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful"); *Holloway,* 220 F.3d at 775 ("'Prosecutors are entitled to absolute immunity for conduct 'intimately associated with the judicial phase of the criminal process.' … Prosecutors are not absolutely immune when they perform administrative, investigative, or other functions ….") (quoting *Imbler,* 424 U.S. at 430). McCree was not performing an administrative function in any of the nonjudicial actions that King cites.

There is no conflict about the functional approach to immunity in this Court's jurisprudence or in the jurisprudence of lower courts. King's fourth argument does not justify certiorari.

CONCLUSION

King has not shown an actual error by the Sixth Circuit Court of Appeals or a conflict that might support his petition for a writ of certiorari. Judicial-immunity law has been settled since 1871 and the Sixth Circuit Court of Appeals correctly applied that law to the facts in this case. There is no reason for this Court to reverse course after almost a century-and-a-half of consistent judicial-immunity jurisprudence. Accordingly, McCree respectfully requests that this Court deny King's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX 1

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

[Filed January 9, 2014]

CIVIL ACTION NO. 3:09-cv-286

(JUDGE CAPUTO)

FLORENCE WALLACE, et al.,

Plaintiffs,

v.

ROBERT J. POWELL, et al.,

Defendants.

CIVIL ACTION NO. 3:09-cv-0291

(JUDGE CAPUTO)

WILLIAM CONWAY, et al.,

Plaintiffs,

v.

MICHAEL T. CONAHAN, et al.,)
)
Defendants.)
_____)

CIVIL ACTION NO. 3:09-cv-0357

(JUDGE CAPUTO)

_____

H.T., et al.,)
)
Plaintiffs,)
)
v.)
)
MARK A. CIAVARELLA, Jr., et al.,)
)
Defendants.)
_____)

CIVIL ACTION NO. 3:09-cv-0630

(JUDGE CAPUTO)

_____

SAMANTHA HUMANIK,)
)
Plaintiff,)
)
v.)
)
MARK A. CIAVARELLA, JR., et al.,)
)
Defendants.)
_____)

CIVIL ACTION NO. 3:09-cv-0357

(JUDGE CAPUTO)

RAUL CLARK, et al.,

Plaintiffs,

v.

MICHAEL T. CONAHAN, et al.,

Defendants.

CIVIL ACTION NO. 3:09-cv-2535

(JUDGE CAPUTO)

WAYNE DAWN, et al.,

Plaintiffs,

v.

MARK A. CIAVARELLA, JR., et al.,

Defendants.

CIVIL ACTION NO. 3:10-cv-1405

(JUDGE CAPUTO)

ANGELA RIMMER BELANGER, et al.,

Plaintiffs,

v.)
)
MARK A. CIAVARELLA, et al.,)
)
Defendants.)
_____)

MEMORANDUM

Presently before the Court is Plaintiffs' Motion for Partial Summary Judgment of Liability on Impartial Tribunal Claims Against Defendant Ciavarella. (Doc. 1459.)[1] Plaintiffs seek summary judgment against Mark Ciavarella, a former Luzerne County Court of Common Pleas judge, for his nonjudicial conduct which Plaintiffs assert set in motion and furthered a conspiracy that deprived them of their constitutional right to an impartial tribunal. Because the undisputed facts establish that Ciavarella's non-judicial acts subjected Plaintiffs to a deprivation of their constitutional right to an impartial tribunal, the motion for partial summary judgment will be granted.

I. Relevant Factual Background

This civil action arises out of the alleged conspiracy related to the construction of juvenile detention facilities, and subsequent detainment of juveniles in these facilities, orchestrated by two former Luzerne County Court of Common Pleas judges, Michael Conahan ("Conahan") and Mark Ciavarella ("Ciavarella"). Plaintiffs in this action seek redress

[1] Partial summary judgment is sought by Plaintiffs in Case Nos. 09-286 (*"Wallace"*), 09-291 (*"Conway"*), 09-357 ("H.T."), and 09-630 (*"Humanik"*) of the consolidated cases. (Doc. 1459.)

from the former judges, as well as the individuals and business entities involved in the construction and operation of these facilities, for the alleged unlawful conspiracy and resulting deprivations of Juvenile Plaintiffs' rights. The alleged conspiracy and resulting injury to Plaintiffs are described in the two operative complaints, the Master Complaint for Class Actions ("CAC") filed by Class Plaintiffs in *H.T.* and *Conway* (Doc. 136), and the Master Long Form Complaint ("IC") filed by Individual Plaintiffs in *Wallace* and *Humanik.* (Doc. 134.)

The Complaints assert the following claims against Ciavarella: (A) violation of Juvenile Plaintiffs' right to an impartial tribunal (CAC Count I; IC Count III); (B) conspiracy to violate Juvenile Plaintiffs' right to an impartial tribunal (CAC Count II; IC Count III); (C) violation of Juvenile Plaintiffs' right to counsel and/or to a knowing, intelligent, and voluntary guilty plea (CAC Count III; IC Count III); (D) conspiracy to deprive Juvenile Plaintiffs of their right to counsel and/or to a knowing, intelligent, and voluntary guilty plea (CAC Count IV; IC Count III); (E) violation of the civil RICO Act, 18 U.S.C. § 1962(c) (CAC Count V; IC Count I); (F) conspiracy to violate the civil RICO Act, 18 U.S.C. § 1962(d) (CAC Count VII; IC Count II); and (G) civil conspiracy (IC Count VIII). On July 27, 2009, Ciavarella filed a motion to dismiss the Complaints in their entirety as to him on the basis of judicial immunity.[2]

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[2] Conahan also filed a motion to dismiss based on the doctrines of judicial and legislative immunities. (Doc. 216.)

By Memorandum and Order dated November 20, 2009, Ciavarella's motion to dismiss was granted in part and denied in part. *See Wallace v. Powell*, No. 9-286, 2009 WL 4051974 (M.D. Pa. Nov.20-2009). In that Memorandum, I noted that "[b]ecause the law requires that judges no matter how corrupt, who do not act in the clear absence of jurisdiction while performing a judicial act, are immune from suit, former Judge Ciavarella will escape liability for the vast majority of his conduct in this action." *Id.* at *9. Specifically, I held that Ciavarella's courtroom acts, namely, the "determinations of delinquency and the sentences imposed," were judicial acts shielded by judicial immunity. *Id.* at *8. Thus, Ciavarella's motion to dismiss was granted as to his "courtroom conduct." *Id.* at *10.

However, because not *"every* act of [Ciavarella] was judicial in nature," the remainder of his motion to dismiss based on judicial immunity was denied. *Id.* at *8 (emphasis in original). In particular, the doctrine of judicial immunity did not provide Ciavarella protection for the allegations relating to non-judicial acts. *Id.* at *10. For instance, Ciavarella's role "in coercing probation officers to change their recommendations is outside the role of a judicial officer" and not protected by judicial immunity. *Id.* at *8. Thus, as to Ciavarella's non-judicial conduct, his motion to dismiss was denied. *See id.* at *10.

On September 8, 2010, Ciavarella filed his Answers with Affirmative Defenses to the Complaints. (Docs. 578; 579.) Thereafter, the actions proceeded to discovery. Additionally, by Memorandum and Order dated May 14, 2013, the motions filed by Plaintiffs in

H.T. and *Conway* for class certification as to all issues of Defendants' liability was granted, (Docs. 1409; 1410), and a dispositive motion deadline was set for November 4, 2013. (Docs. 1420; 1437.)

On November 4, 2013, Plaintiffs filed the instant motion for partial summary judgment as to liability on their impartial tribunal claims against Ciavarella, a statement of facts, and brief in support of the motion. Plaintiffs, while reserving their rights to appeal, "seek summary judgment against Ciavarella in the context of the Court's immunity ruling." (Doc. 1460, 3 n.2.) Ciavarella's brief in opposition was due on November 29, 2013. *See* Fed. R. Civ. P. 5(b)(2)(c); Fed. R. Civ. P. 6(d); M.D. Pa. L.R. 7.6. Ciavarella has failed to file a brief in opposition or otherwise oppose Plaintiffs' motion. As such, Plaintiffs' motion for partial summary judgment is ripe for disposition.

II. Legal Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Wright v. Corning*, 679 F.3d 101, 103 (3d Cir. 2012) (quoting *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995)). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive

law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. *See Edelman v. Comm'r of Soc. Sec.*, 83 F.3d 68, 70 (3d Cir. 1996). Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Anderson*, 477 U.S. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.* Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* 2D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2727 (2d ed.1983). The moving party may present its own evidence or, where the non-moving party has the burden of proof, simply point out to the court that "the non-moving party has failed to make a sufficient showing on an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

"When considering whether there exist genuine issues of material fact, the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). Once the moving party has satisfied its initial burden, the burden shifts to the non-moving party to either present affirmative evidence supporting its version of the

material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *Anderson*, 477 U.S. at 256–57. The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

"To prevail on a motion for summary judgment, the non-moving party must show specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial." *Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 270 (3d Cir. 2007) (citing Fed. R. Civ. P. 56(e)). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla." *Id.* (quoting *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005)). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. Discussion

As noted, Plaintiffs filed their motion for partial summary judgment against Ciavarella, statement of undisputed facts, and brief in support on November 4, 2013. Ciavarella, however, has failed to oppose Plaintiffs' motion. Plaintiffs' motion for partial summary judgment is thus deemed unopposed. Moreover, because Ciavarella failed to file a statement of material facts controverting Plaintiffs' properly filed statement of facts, all material facts set forth in

Plaintiffs' Statement (Doc. 1459-2) will be deemed admitted pursuant to Middle District of Pennsylvania Local Rule 56.1. *See* M.D. Pa. L.R. 56.1 (providing, in pertinent part, that "[s]tatements of material fact in support of, or in opposition to, a motion shall include references to the parts of the record that support the statements. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."). Ciavarella likewise failed to submit any evidence in response to that submitted by Plaintiffs. Nonetheless, I must still analyze the merits of Plaintiffs' motion to determine whether summary judgment is appropriate. *See Lorenzo v. Griffith*, 12 F.3d 23, 28 (3d Cir. 1993); *Anchorage Associates v. Virgin Islands Board of Tax Review*, 922 F.2d 168, 174-75 (3d Cir. 1990); *Moultrie v. Luzerne Cnty. Prison*, No. 06–1153, 2008 WL 4748240, at *2 (M.D. Pa. Oct. 27, 2008).

A. Undisputed Facts

Plaintiffs' Statement of Facts (Doc. 1459-2) as to which there is no genuine issue of dispute and supporting Exhibits (Doc. 1459, Exs.1-30) establish the following:

1. The Conspiracy

At all relevant times to this litigation, Ciavarella and Conahan were judges of the Court of Common Pleas for Luzerne County, Pennsylvania. (*Plaintiffs' Statement of Material Facts* ("*Plfs.' SMF*"), Doc. 1459-2, ¶ 20.) Conahan served as president judge of the court between 2002 and 2007. (*Id.* at ¶ 21.) Ciavarella served

as judge of the juvenile court from 1996 until September 2001, then again from January 2002 through June 2008. (*Id.* at ¶ 22.)

In late 1999, Ciavarella approached Conahan and suggested that they bring together a team that had the financial ability to build a new juvenile detention facility. (*Ciavarella Test.*, 13:1-7.) At Ciavarella's initiative, Conahan assembled a meeting of individuals, including Robert Powell ("Powell"), that potentially had the financial resources to construct a new facility. (*Ciavarella Test.,* 13:10-18.) Ciavarella subsequently contacted Robert Mericle ("Mericle") about becoming involved in the project at the suggestion of Conahan. (*Ciavarella Test.*, 16:4-12.) Ultimately, Mericle acquired property for the juvenile detention facility in Pittston, Pennsylvania, and Powell and his partner formed PA Child Care ("PACC") to build the juvenile detention facility. (*Plfs.' SMF*, ¶¶ 27-28.)

Constructing the detention facility initially proved difficult for PACC's owners because they faced hurdles acquiring financing. (*Id.* at ¶ 29.) In particular, the lenders they approached indicated that they were unwilling to loan money unless they had a concrete agreement ensuring repayment. (*Id.*) On or around July 11, 2001, Powell informed Conahan that unless there was an agreement with either Luzerne County or some other entity that could promise that children would be sent to PACC, they would not be able to build the facility. (*Id.* at ¶ 30.) Powell then developed a plan which called for the president judge to sign a placement guarantee to show to lenders. (*Powell Test.*, 119:7-16.) Because Conahan would not become president judge until January 2002, the parties waited to go forward

with the plan to build the facility. (*Plfs.' SMF*, ¶ 31.) After Conahan became president judge, he signed a placement guarantee agreement stating that the Luzerne County Court of Common Pleas would pay PACC rent for a new facility in monthly installments which amounted to $1,314,000 annually. (*Id.* at ¶ 32.) As a result, PACC was able to obtain over $12,000,000 in financing. (*Id.*)

Ciavarella learned of the placement guarantee agreement shortly after it was signed, and he knew that the agreement required Luzerne County to make payments to PACC. (*Ciavarella Test.*, 109:7-110:19.) Ciavarella, however, never told anyone about the agreement. (*Id.* at 112:20-22.)

Once Conahan became president judge, he informed the Luzerne County Commissioners that the court would no longer send juveniles to the existing Luzerne County Juvenile Detention Center (the "River Street facility"). (*Id.* at 107:17-18.) Ciavarella also had no intention of sending any juveniles to the River Street facility. (*Id.* at 108:9-12.) Conahan did not seek any funds for the operation of the River Street facility, (*id.* at 107:14-16), and he instructed the Luzerne County Probation Department to return the facility's license to the Pennsylvania Department of Public Welfare. (*Powell Test.*, 125:15-19.)

Ciavarella assisted PACC in getting the facility off the ground. In particular, Ciavarella helped PACC hire the employees of the old facility, which further ensured that the River Street facility could not re-open. (*Id.* at 124:4-125:1.) Ciavarella and Conahan also appeared on television on December 19, 2002 to discuss the need to shut down the River Street facility. (*Ciavarella Test.*,

83:24-84:11, 88:5-13). Ciavarella later acknowledged that he "was not doing anything in [his] official capacity as a judge" when he gave the interview. (*Id.* at 86:18-19.) According to Ciavarella, his actions, together with the actions of Conahan, put the River Street facility out of business. (*Ciavarella Test.*, 108:13-17.) Ciavarella was also aware that closing the River Street facility would benefit PACC. (*Id.* at 87:23-88:1.)

In order to ensure the success of the PACC facility, Powell was told by Conahan that Ciavarella would need to be taken care of financially. (*Powell Test.*, 127:25-128:8.) In January 2003, Powell signed an agreement back-dated to February 19, 2002 stating that Mericle would pay him a referral fee once the construction of the PACC facility was completed. (*Id.* at 130:12-131:2.) Powell knew, however, that the approximately $1,000,000 was not intended for him but was intended for Ciavarella and Conahan. (*Id.* at 131:10-12.)

On January 16, 2003, at the direction of Conahan, Powell drafted a document instructing Mericle to pay $610,000 to Robert Matta ("Matta."). (*Id.* at 132:20-133:1.) The money was wire transferred to Matta on January 21, 2003. (*Matta Test.*, 95:4-10.) On January 28, 2003, Matta transferred the $610,000 to Beverage Marketing of PA, Inc. (*Id.* at 95:19-23.) On January 28, 2003, $330,000 was transferred from Beverage Marketing to Ciavarella's bank account, and on April 30, 2003 and July 15, 2003, $75,000 was wired from Beverage Marketing to Ciavarella's account. (*Plfs.' SMF*, ¶¶ 49-51.)

After the PACC facility opened in February 2003, (*Plfs.' SMF*, ¶ 82), Ciavarella and Conahan kept track

of the number of children sent to the facility and how PACC was doing financially. (*Powell Test.*, 139:17-140:14.) Ciavarella continued to monitor the profitability of PACC until 2008. (*Plfs.' SMF*, ¶ 53.)

Powell's company, Vision Holdings, and his business partner's company, CIS, doing business as Western PA Child Care ("WPACC"), entered into a new contract with Mericle Construction in June 2004 to construct a juvenile detention and treatment facility in western Pennsylvania. (*Powell Test.*, 157:6-9.) The WPACC facility was completed in July 2005. (*Plfs.' SMF*, ¶ 56.) When the WPACC facility was completed, Mericle paid Conahan and Ciavarella an additional $1,000,000. (*Mericle Test.*, 31:10-13.) Similar to the payments related to the PACC facility, bogus financial transactions were used to conceal the payments from Mericle to Conahan and Ciavarella through Powell in connection with the WPACC facilty. (*Powell Test.*, 160:6-25.) With respect to the second two payments from Mericle to Conahan and Ciavarella, Ciavarella provided the directions as to where the money should be sent. (*Plfs.' SMF*, ¶ 58.)

In February 2006, Mericle Construction completed a 12 bed addition to the PACC facility. (*Mericle Test.*, 38:14-39:12.) Mericle paid $150,000 to the former judges for the privilege of building the addition to the PACC facility. (*Id.* at 38:19-22.)

Acting on behalf of other Private Defendants in this action, Powell made payments, including from PACC's funds, to Conahan and Ciavarella. (*Plfs.' SMF*, ¶ 63.) These payments included checks and wire transfers to Pinnacle Group of Jupiter, an entity controlled by Conahan and Ciavarella, (*id.*), and Powell falsely

documented the payments for various legitimate reasons, such as "rent prepay," "marina prepay," "reserving lease," "rental," and "slip rental fee" to conceal that the payments were for Conahan and Ciavarella. (*Powell Test.*, 145:15-152:21.) These payments totaled at least $590,000 in draws taken by Powell from the PACC account. (*Id.* at 153:9-20.)

Between 2003 and 2007, Ciavarella admitted that he was paid more than $2,700,000 and that he concealed all of the payments. (*Ciavarella Test.*, 116:3-9, 128:1-17.) The payments were concealed by Ciavarella because he knew it "wouldn't look good" if he was receiving payments from Powell while also sending juveniles to his facility. (*Id.* at 128:1-17.)

Between 2003 and 2007, Ciavarella sent anywhere from 217 to 330 juveniles to placement each year. (*Plfs.' SMF*, ¶ 84.) However, between 2009 and 2011, the Luzerne County juvenile court sent between 31 and 38 juveniles for placement each year. (*Id.* at ¶ 85.)

Ciavarella also testified in a hearing conducted in *Joseph v. Scranton Times*, No. 2166-C-2009, in the Lehigh County Court of Common Pleas that he had a duty to disclose material information relevant to his ability to engage in impartial discretionary decision-making. (*Plfs.' SMF*, ¶ 69.) Ciavarella admitted that he violated this duty, and he further acknowledged that during the relevant time period he never informed any of the juveniles who appeared before him that he was receiving money from PACC, WPACC, or Powell. (*Id.* at ¶ 70.)

2. Pennsylvania Supreme Court King's Bench Proceedings

In light of the events described above, the United States Attorney for the Middle District of Pennsylvania, on January 26, 2009, filed a Bill of Information alleging two counts of fraud against Ciavarella and Conahan. (*Plfs.' SMF*, ¶ 1.) Shortly thereafter, on February 11, 2009, the Pennsylvania Supreme Court assumed plenary jurisdiction and appointed the Honorable Arthur E. Grim as Special Master "to review all Luzerne County juvenile court adjudications and dispositions that have been affected by the recently-revealed criminal allegations." (*In re: J.V.R.*, No. 81 MM 2008, Feb. 11, 2009 Order.) The Pennsylvania Supreme Court found:

> Ciavarella admitted under oath that he had received payments from Robert Powell, a co-owner of the PA Child Care and Western PA Child Care facilities, and from Robert K. Mericle, the developer who constructed the juvenile facilities, during the period of time that Ciavarella was presiding over juvenile matters in Luzerne County. It is a matter of record that Ciavarella routinely committed juveniles to one or another of these facilities. It is also a matter of record that Ciavarella failed to disclose his ties to Powell, much less the financial benefits he received in connection with the facilities to which he routinely committed Luzerne County juveniles. Ciavarella's admission that he received these payments, and that he failed to disclose his financial interests arising from the development of the juvenile facilities, thoroughly

> undermines the integrity of all juvenile proceedings before Ciavarella. Whether or not a juvenile was represented by counsel, and whether or not a juvenile was committed to one of the facilities which secretly funneled money to Ciavarella and Conahan, this Court cannot have any confidence that Ciavarella decided any Luzerne County juvenile case fairly and impartially while he labored under the specter of his self-interested dealings with the facilities.

(*In re: J.V.R.*, No. 81 MM 2008, Slip. Op. (Oct. 29, 2009) (per curiam)). Thus, the Pennsylvania Supreme Court concluded that "given the nature and extent of the taint, this Court simply cannot have confidence that any juvenile matter adjudicated by Ciavarella during this period was tried in a fair and impartial manner." (*Id.* (emphasis in original).)

3. Ciavarella and Conahan's Criminal Proceedings

As noted, on January 26, 2009, the United States Attorney for the Middle District of Pennsylvania filed a Bill of Information alleging two counts of fraud against Ciavarella and Conahan. (*Plfs.' SMF*, ¶ 1.) The Bill described a conspiracy among the judges and at least two other unnamed parties to conceal $2,600,000 in payments to the judges from the owners of PA Child Care ("PACC") and Western PA Child Care ("WPACC"). (*Id.*) Ciavarella and Conahan, pursuant to plea agreements they had reached with the United States, pled guilty to these counts, but the plea agreements were rejected by the Court. (*Id.* at ¶¶ 2-3.)

On September 9, 2009, a federal grand jury returned a 48-count indictment against Ciavarella and Conahan alleging racketeering, fraud, money laundering, extortion, bribery, and federal tax violations in connection with the construction and operation of juvenile detention facilities owned by PACC and WPACC. (*Id.* at ¶ 4.)[3] Ciavarella was subsequently re-indicted on September 29, 2010 in a 39-count superseding indictment. (*Id.* at ¶ 8.) Ciavarella pled not guilty to the charged offenses. (*Id.* at ¶ 9.)

Ciavarella proceeded to trial, and the jury returned a verdict finding Ciavarella guilty of 12 of the 39 counts of the superseding indictment, including racketeering, racketeering conspiracy, money laundering conspiracy, conspiracy to defraud the United States, mail fraud, and filing false tax returns. (*Id.* at ¶ 10.) On August 11, 2011, Ciavarella was sentenced to serve 28 years in prison. (*Id.* at ¶ 11.)

4. Robert Powell and Robert Mericle's Criminal Proceedings

On June 9, 2009, the United States Attorney for the Middle District of Pennsylvania filed a two-count Bill of Information against Robert Powell. (*Id.* at ¶ 13.) Powell plead guilty and was sentenced to serve 18 months in prison. (*Id.* at ¶¶ 14-15.) Robert Mericle also pled guilty to misprison of a felony. He has yet to be sentenced. (*Id.* at ¶ 16.)

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[3] Conahan entered a guilty plea on July 23, 2010, and he was adjudicated guilty as to Count 2 of the indictment and sentenced to a term of imprisonment of 210 months.

B. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek partial summary judgment on their claims against Ciavarella for violation of their right to an impartial tribunal and conspiracy to violate their right to an impartial tribunal as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Plaintiffs' claims are brought pursuant to 42 U.S.C. § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured, . . ." 42 U.S.C. § 1983. "To establish liability under 42 U.S.C. § 1983, a plaintiff must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005) (citing *Sameric Corp. of Del., Inc. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998)). Plaintiffs seek summary judgment as to liability against Ciavarella on the impartial tribunal claims for his non-judicial acts that set the conspiracy in motion and furthered the conspiracy.

1. Under Color of Law

Under § 1983, Plaintiffs must establish that Ciavarella was acting under color of law. "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed

with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941)). Here, the undisputed facts confirm that at all times relevant to Ciavarella's non-judicial acts alleged in the Complaints and for which summary judgment is sought, Ciavarella was a Luzerne County Court of Common Pleas judge cloaked with the authority of state law. (*Plfs.' SMF*, ¶¶ 20, 22.) Ciavarella was therefore acting under color of state law. *Cf. Lopez v. Vanderwater*, 620 F.2d 1229, 1236 (7th Cir. 1980) (rejecting state court judge's claim that "[i]f jurisdiction is absent or the act is not judicial, counsel maintains, the color of law requirement is not met; if the color of law requirement is met, the act is judicial and jurisdiction is present," because "[a]cceptance of this theory would remove the limitations on absolute judicial immunity discussed above and render judges immune from any suit whatsoever under § 1983.").

2. Deprivation of Constitutional Rights

According to Plaintiffs, the undisputed facts demonstrate that their federal constitutional rights to an impartial tribunal were violated when they appeared in Ciavarella's courtroom.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jericho*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980). Indeed, "it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (quoting *In re Murchinson*, 349 U.S. 133,

136, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955)). As such, "a criminal defendant is guaranteed the right to a fair and impartial tribunal." *Richardson v. Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008) (citing *Bracy v. Gramley*, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997)); *Alley v. Bell*, 307 F.3d 380, 386 (6th Cir. 2002); *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999); *United States v. Cross*, 128 F.3d 145, 148 (3d Cir. 1997). Embodied in the guarantee of an impartial tribunal is the absolute right to a criminal proceeding conducted by a judge free of bias or pecuniary motivation. *See*, *e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749 (1927). The Supreme Court has emphasized that the inquiry as to a judge's bias in the due process context requires an objective determination considering "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 2262, 129 S. Ct. 2252.

I previously held that Plaintiffs "sufficiently established a violation of their federal constitutional rights for purposes of their § 1983 impartial tribunal claims." *Wallace v. Powell*, No. 09-286, 2012 WL 2590150, at *9 (M.D. Pa. July 3, 2012). The Pennsylvania Supreme Court has similarly found that Plaintiffs suffered a violation of their constitutional right to a fair trial before an impartial tribunal. *See id.* (citing *In re: J.V.R.*, No. 81 MM 2008, Slip. Op. (Oct. 29, 2009) (per curiam)). Accordingly, as there is no genuine dispute that all Juvenile Plaintiffs who appeared before Ciavarella during the relevant time

period were denied their constitutional right to an impartial tribunal, this element is established.

3. Liability for Non-Judicial Acts

As discussed in detail above, Ciavarella is immune from suit for his judicial acts. As a result, "Ciavarella will escape liability for the vast majority of his conduct in this action." *Wallace*, 2009 WL 4051974, at *9. Nevertheless, judicial immunity does not shelter Ciavarella's "non-judicial conduct." *Id.* at *9-10.

In view of my prior decision, Plaintiffs contend that Ciavarella is liable for his non-judicial acts which set in motion and furthered the conspiracy that resulted in the deprivation of Juvenile Plaintiffs' right to an impartial tribunal. Judicial acts include those "which are traditionally done by judges [such as] issuing orders, resolving cases and controversies, making rulings, and sentencing criminal defendants." *Wallace*, 2009 WL 4051974, at *7. Plaintiffs argue that Ciavarella engaged in a number of non-judicial acts for which he is not protected by judicial immunity, namely, his role in closing the River Street facility, his enactment and expansion of a zero tolerance policy, and his out-of-court conduct which initiated and thereafter concealed the conspiracy.

a. Closing of the River Street Facility

First, Plaintiffs contend that the undisputed facts entitle them to summary judgment on their impartial tribunal claims against Ciavarella relating to his role in closing the River Street facility. Presented with a threat that the Luzerne County Commissioners would continue to fund and staff the county-run River Street facility, Ciavarella and Conahan worked together to

ensure that the old facility would be closed. (*Plfs.' SMF*, ¶¶ 38-42, 73-77.) In particular, Ciavarella and Conahan appeared on television in December 2002 to urge the shutdown of the River Street facility. (*Id.* at ¶ 73.) Ciavarella also assisted PACC hire employees from the River Street facility by setting up interviews. (*Id.* at ¶¶ 43, 75.) As a result, Ciavarella ensured that the River Street facility could not re-open, effectively putting the facility out of business. (*Id.* at ¶¶ 41-42.)

Ciavarella is not entitled to judicial immunity for his role in closing the River Street facility. That is, appearing on television urging a shutdown of a county-run detention facility and facilitating hiring decisions for a private detention facility are not functions "normally performed by a judge." *Wallace*, 2009 WL 4051974, at *7 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). During Ciavarella's criminal trial, he acknowledged that he was not performing any official duties when he took part in the television interview. (*Plfs.' SMF*, ¶ 74.) Moreover, aiding PACC in staffing its facility with employees of the River Street facility also falls outside the traditional role of a judge. *Cf. Forrester v. White*, 484 U.S. 219, 229, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) ("personnel decisions made by judges[ ] are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.").

b. Zero Tolerance Policy

Second, Plaintiffs argue that the enactment of a zero tolerance policy was not a judicial act. While Ciavarella served as judge of the juvenile court, he

enacted an administrative policy that dictated instances in which probation officers had to file charges against and detain juveniles in Luzerne County. (*Plfs.' SMF*, ¶¶ 79-82.) Ciavarella expanded his zero tolerance policy in February 2003, the same month PACC opened, to require that children on probation be violated and detained for any violation of their probation, including zero tolerance for drug and alcohol violations, not attending school, not attending appointments, or violating curfew. (*Id.* at ¶ 80.) Under this policy which was distributed to all juvenile probation officers on February 20, 2003, (*id.* at ¶ 82), Ciavarella eliminated juvenile probation officers' discretion to informally adjust juveniles' charges. (*Id.* at ¶ 79.)

Ciavarella's enactment and expansion of a zero tolerance policy dictating how probation officers were to handle violations of probation and other charging decisions fall outside the scope of judicial action. "Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." *Forrester*, 484 U.S. at 228, 108 S. Ct. 538, 98 L. Ed. 2d 555. Under Pennsylvania law, probation officers have the authority to informally adjust allegations before a delinquency petition is filed. *See* 42 Pa. Cons. Stat. Ann. § 6323; Pa. R. Juv. Ct. P. 312 ("At any time prior to the filing of a petition, the juvenile probation officer may informally adjust the allegation(s) if it appears: (1) an adjudication would not be in the best interest of the public and the juvenile; (2) the juvenile and the juvenile's guardian consent to informal adjustment with knowledge that consent is not obligatory; and (3) the admitted facts bring the case within the jurisdiction of the court.").

Moreover, "coercing probation officers to change their recommendations is outside the role of a judicial officer. Probation officers are to advise the court, not the other way round, on sentencing matters." *Wallace*, 2009 WL 4051974, at *8. In adopting the zero tolerance policy, Ciavarella was acting in an administrative capacity, and acts such as that which involve "supervising court employees and overseeing the efficient operation of a court- may have been quite important in providing the necessary conditions of a sound adjudicative system. The decision[ ] at issue, however, [was] not [itself] judicial or adjudicative." *Forrester*, 484 U.S. at 229, 108 S. Ct. 538. Because Ciavarella's enactment and expansion of the zero tolerance policy were non-judicial acts, judicial immunity does not shield this conduct.

c. Additional Out-of-Court Actions

Finally, Ciavarella is not sheltered from liability for his out-of-court conduct that was not judicial in nature. Ciavarella initiated the plan by approaching Conahan and suggesting that they bring together a team that had the financial ability to construct a new detention facility. (*Plfs.' SMF*, ¶¶ 23-26.) Ciavarella also connected Powell and Mericle. (*Id.* at ¶ 26.) Ciavarella's failure to disclose the payments he received from Mericle and Vision Holdings also furthered the conspiracy. Specifically, Ciavarella took steps to conceal the more than $2,700,000 he and Conahan received from Mericle and Powell starting in 2003. (*Id.* at ¶ 66.) Indeed, Ciavarella sought to conceal the payments because knew that it would not look good that he was receiving payments from Powell while sending juveniles to his detention facility. (*Id.* at ¶ 67.) In that regard, Ciavarella instructed Mericle where to

send the second and third payments. (*Id.* at ¶ 58.) This out-of-court conduct was not judicial in nature, and, as such, is not protected by judicial immunity.

4. Causation

Lastly, Plaintiffs must establish that Ciavarella "caused the complained of injury." *Elmore*, 399 F.3d at 281. I previously indicated that the "setting in motion" theory of causation would be applied to individual Defendants in this case. *See Wallace*, 2012 WL 2590150, at *11. This standard provides:

> A person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, if [that person] does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [that person] is legally required to do that causes the deprivation of which complaint is made. Indeed, the requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Id. (quoting *Pilchesky v. Miller*, No. 05–2074, 2006 WL 2884445, at *4 (M.D. Pa. Oct.10, 2006). While the Third Circuit has not squarely addressed the issue of causation in § 1983 cases, *see, e.g., Burnsworth v. PC Lab.*, 364 F. App'x 772, 775 (3d Cir. 2010), the "setting in motion" theory has been accepted by multiple Circuit Courts of Appeals. *See, e.g., Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011); *Sanchez v. Pereira-Castillo*,

590 F.3d 31, 51 (1st Cir. 2009); *Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir. 1999); *Sales v. Grant*, 158 F.3d 768, 776 (4th Cir. 1998); *Waddell v. Forney*, 108 F.3d 889, 894 (8th Cir. 1997); *Conner v. Reinhard*, 847 F.2d 384, 396-97 (7th Cir. 1988).

The undisputed facts establish that Ciavarella caused the violation of Plaintiffs' right to an impartial tribunal through the receipt and concealment, by himself and Conahan, of payments from and through other Defendants. In particular, Ciavarella knew he had a duty to disclose information relevant to his ability to engage in impartial decision-making, that he violated that duty, and that he never informed any juveniles that he was receiving payments from PACC, WPACC, or Powell. (*Plfs.' SMF*, ¶¶ 69-70.) The undisputed facts conclusively establish that Ciavarella knew that, as a result of his conduct, Plaintiffs would be deprived of their right to appear before an impartial tribunal.

Ciavarella's role in closing the River Street facility set the conspiracy in motion. Significantly, knowing that he stood to profit from the completion of the PACC facility, Ciavarella took steps to close the old facility and ensure that it would not re-open, resulting in PACC being the only detention facility in Luzerne County where a child could be detained. (*Id.* at ¶¶ 38-42, 73-77.) Yet, despite his financial stake in closing the River Street facility, he never disclosed this interest. (*Id.* at ¶¶ 44, 69-72.) Thus, the undisputed material facts establish that Ciavarella knew, or he should have known, that his role in the closure of the River Street facility and his concealment of his interest in its closure (and the resulting opening of the PACC

facility while he served as judge of the juvenile court) would deprive Plaintiffs of an impartial tribunal.

The zero tolerance policy adopted by Ciavarella also furthered the conspiracy and caused the deprivation of Plaintiffs' right to an impartial tribunal. In 2003 when Ciavarella knew he had a financial interest in PACC, he expanded the zero tolerance policy, which increased the number of juveniles that would appear before him and be detained. As a result of the expansion of this policy, more juveniles appeared before him and were subject to adjudication by a biased tribunal. And, as detailed above, Ciavarella's out-of-court conduct which set the conspiracy in motion, and which concealed the existence and the nature of the conspiracy, as well as the corresponding payments, all furthered the goals of the conspiracy. As the undisputed facts establish that Ciavarella knew or should have known that, as a result of his out-of-court conduct, Plaintiffs would not appear before an impartial tribunal when they were in his courtroom, the causation element of Plaintiffs' § 1983 impartial tribunal claims against Ciavarella is satisfied.

Therefore, for Ciavarella's conduct which is not protected by judicial immunity, *i.e.*, his nonjudicial acts, Ciavarella is liable to Plaintiffs on their § 1983 impartial tribunal claims. In particular, Ciavarella's non-judicial acts detailed above set in motion and/or caused the deprivation of Plaintiffs' right to an impartial tribunal as he initiated the scheme to construct a new detention facility, he assisted in closing the River Street facility, and he expanded a policy which increased the number of juveniles that appeared before him. And, these acts were all taken without

Ciavarella ever disclosing, and, in fact, while he took affirmative steps to conceal his financial interest in the success of PACC and WPACC. Accordingly, pursuant to 42 U.S.C. § 1983, Ciavarella subjected Plaintiffs to a deprivation of their constitutional right to an impartial tribunal. For the conduct which Ciavarella is not shielded by judicial immunity, he is liable to Plaintiffs on their § 1983 impartial tribunal claims

IV. Conclusion

For the above stated reasons, Plaintiffs' motion for partial summary judgment against Defendant Ciavarella will be granted. Judgment will be entered in Plaintiffs' favor and against Ciavarella for his conduct which is not protected by judicial immunity on the claims for violation of Juvenile Plaintiffs' right to an impartial tribunal (CAC Count I; IC Count III), and conspiracy to violate Juvenile Plaintiffs' right to an impartial tribunal (CAC Count II; IC Count III). A determination of damages will be made at a later date.

An appropriate order follows.

January 9, 2014
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO.: 13-2033

[Filed January 21, 2014]

ROBERT KING,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
WADE McCREE,	)
	)
Defendant-Appellee,	)
	)

On Appeal from the United States District Court
Eastern District of Michigan Southern Division
Honorable Avern Cohn

PLAINTIFF-APPELLANT BRIEF

ORAL ARGUMENT REQUESTED

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Is the party a subsidiary or affiliate of a publicly owned corporation?

No.

Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law:

Constitution:

Federal Statutes:

State Court Rules and Codes:

Law Review and Scholarly Articles

Other:

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant ("Plaintiff') believes that oral argument would assist the Court in clarifying the reasons to reverse the District Court's ruling that granted Defendant-Appellee's ("Defendant") motion for summary judgment based on judicial immunity.

STATEMENT OF ISSUES PRESENTED

I. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR WHEN IT FOUND THAT McCREE'S EXTRAJUDICIAL SEXUAL ACTIVITY AND COMMUNICATIONS WITH MOTT DID NOT PERSONALLY OR DIRECTLY DEPRIVE PLAINTIFF OF DUE PROCESS?

Plaintiff-Appellant says "Yes."
Defendant-Appellee says "No."
The District Court said "No."

II. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR WHEN IT RULED THAT APPELLEE McCREE WAS NOT ACTING UNDER COLOR OF STATE LAW WHEN HE BECAME SEXUALLY INVOLVED WITH MOTT DURING THE PERIOD HE PRESIDED OVER PLAINTIFF'S CASE?

Plaintiff-Appellant says "Yes."
Defendant-Appellant says "No."
The District Court said "No."

INTRODUCTION

This is a § 1983 civil rights case that has been impaired by the wrongful application of absolute judicial immunity. Defendant-Appellee, Wayne County Circuit Court Judge Wade McCree[1], used the powers and prestige of his office to initiate, cultivate and continue a surreptitious sexual (emotional and economic) relationship with Geniene La' Shay Mott, the complaining witness in a felony child support case against Plaintiff-Appellant Robert King, over which Defendant-Appellee McCree presided. (R. 1, Complaint, Pg ID 1-11).

McCree admits to the sexual affair with Mott and his efforts to conceal it from Plaintiff. (R. 18-5, McCree Answer to JTC Complaint, Pg ID 273). There is no genuine dispute that McCree participated in thousands of extrajudicial contacts with Mott or that the two had ex parte discussions how to compel Plaintiff to pay Mott money, including using the "the threat of jail [to] loosen [Plaintiff's] purse strings." (R. 18-5, McCree Answer to JTC Complaint, Pg ID 262-263; R. 18-6, *Ex-Girlfriend Details Affair*, 294-295; R. 18-9, *Michigan Judge Testified He Gave Mistress $6,000,* Pg ID 303; R. 18-10, *'Shirtless Judge' McCree Allegedly Impregnates*

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[1] Defendant-Appellee is the son of an icon; the venerated Honorable Wade Hampton McCree, Jr., who was the first African American appointed to the Sixth Circuit Court of Appeals and was the second African American Solicitor General of the United States. The elder McCree died in 1987. He remains revered as a champion of civil rights and a man of unquestioned integrity. Plaintiff-Appellant is unable to speak to the possibility that the shadow of the Honorable Wade Hampton McCree animated or encroached up the District Court's decision. One hopes not.

Witness, Lets Her Decide Ex's Sentence, Pg ID 304-305). The only dispute is whether judicial immunity shields McCree from civil liability for violating Plaintiff's due process rights.

The District Court found that judicial immunity applied and dismissed Plaintiff's case against McCree. (R. 22, Memo and Order, Pg ID 382-393). The District Court determined that Plaintiff suffered no injury personal to him because the extrajudicial acts between McCree and Mott "did not directly involve King." (*Id.* at Pg ID 382-393 at 387). The District Court also found that *all* ex-parte non-judicial acts between McCree and Mott were "personal" and McCree's "private pursuit of Mott was not 'under color of state law' solely because of his status as judge." (*Id.* at Pg ID 387-388).

The District Court's analysis and holding are reversibly erroneous. Plaintiff and Mott were parties in a criminal case with competing substantive interests. McCree was the presiding judge. Plaintiff's due process rights, therefore, were directly implicated and violated once McCree in judicial robes, in the court room, began his pursuit of Mott and, under any standard, McCree could not be a fair, impartial and unbiased judge. See, e.g., *In re Murchison*, 349 U.S. 133 (1955); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009); 42 U.S.C. § 1983; MCR 2.003(B); Michigan Code of Judicial Conduct, Canon 2(A)-(C), Canon 5(C). This constitutional deprivation was entirely personal to King who was the direct victim of the McCree's constitutional tort.

In addition, McCree's "judicial status" was exactly what made the affair possible. Only McCree could compel Plaintiff to pay Mott. In return, Mott provided

McCree with sex. Accordingly, McCree was acting under color of state law whenever he engaged in any extrajudicial activity with Mott.

The District Court, therefore, committed reversible error when it ruled that absolute judicial immunity barred Plaintiff's civil rights action against McCree.

STATEMENT OF FACTS AND PROCEEDINGS

A. The underlying facts:

Plaintiff and Geniene La'Shay Mott are the parents of a six year old girl. Defendant McCree was the presiding judge over a felony child support case against Plaintiff in which Mott was the complaining witness. (R. 1, Complaint, Pg ID 1-11). On May 21, 2012, Mott appeared in the courtroom with Plaintiff. McCree testified he was immediately attracted to Mott and flirted with her from the bench. (R. 18-4, *Judge Wade "king of latex" McCree Testifies at Misconduct Trial*, Pg ID 253-255, at 254; R. 18-11, *LeDuff: Judge Wade McCree Strike Two*, Pg ID 306-307). At the hearing, McCree accepted Plaintiff's guilty plea to the charge of failing to pay child support under a delayed sentence agreement pursuant to MCL 771.1(1). (R. 18-3, JTC Complaint, Pg ID 193; R. 18-5, McCree JTC Answer, Pg ID 258).

When the courtroom emptied, McCree approached Mott, handed her his judicial business card and instructed her to contact him[2]. (R. 1, Complaint, Pg ID

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[2] At his JTC hearing McCree testified:

> I confess, she was an attractive, striking woman and she caught my eye ... We chatted for sure. As you can probably tell,

4; R. 18-3, JTC Complaint, Pg. ID 193; R. 18-11, *LeDuff: Judge McCree Strike Two*, Pg ID 306-07). Mott called the next day and the two met for lunch on May 30, 2012. (R. 1, Complaint, Pg ID 4; R. 18-5, McCree Answer to JTC Complaint, Pg. ID 193).

Within a week of their lunch date, the two began an "intense," "passionate" and "volatile" sexual affair[3], which lasted through November, 2012. (R. 18-5, McCree Answer to JTC Complaint, Pg ID 260-262; R. 18-4, *Wade 'king of latex' McCree's Testifies at Misconduct Trial,* Pg. ID 253-255; R 18-7, *Affair With Witness Clouded My Judgment,* Pg ID No 297-298). McCree and Mott had sexual "romps" in McCree's judicial chambers and marital home. (R. 18-6, *Ex-Girlfriend Details Affair,* Pg ID 295; R. 18-5, McCree Answer to JTC Complaint, Pg ID 262-263; R. 18-11, *LeDuff: Judge McCree Strike Two*, Pg. ID 306-307). He promised to marry Mott, buy a house together, gave her $6,000 for living expenses and had Mott and her

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> I'm a bit animated, I'm a rather effervescent personality ...
>
> ****
>
> I don't want to say the water came to the horse, but I must say she certainly was coming on to me with an ease that surprised me; it thrilled me. Women this young don't talk to me like this. I was flattered and to use the vernacular, maybe my nose got opened up a little bit.

(R. 18-4, *Judge Wade "king of latex" McCree Testifies at Misconduct Trial*, Pg ID 253-255, at 254).

[3] After he began his affair, McCree testified that it never dawned on him to re-assign the case to another judge because he was thinking of "a woman two dozen years my junior." (R. 18-7, *Affair With Witness Clouded My Judgment,* Pg ID 297).

adolescent move into the Ann Arbor home of his deceased mother. (R. 18-11, *LeDuff: Judge McCree Strike Two*, Pg. ID 306-307; R. 18-9, *Judge Testified He Gave Mistress $6,000,* Pg ID 303). McCree and Mott exchanged over 10,000 emails, texts (including those sent and received from the bench[4]) and phone calls, many of which discussed Plaintiff's case. (R. 18-6, *Ex-girlfriend Details Affair,* 294-296; R. 18-9, *Michigan Judge Testified He Gave Mistress $6,000*, Pg ID 303; R. 18-11, *LeDuff: Judge McCree Strike Two*, Pg. ID 306-307; R 18-5, McCree Answer to JTC Complaint, Pg ID 261-268). McCree knew he should have disqualified himself from Plaintiff's case once the affair began but did not. (R. 18-11, *LeDuff: Judge Wade McCree Strike Two*, Page ID 306-307; R. 18-5, McCree Answer to JTC Complaint, Pg ID 269, 286-287, 290).

On June 20, 2012, Defendant, who was already under investigation by the Michigan Judicial Tenure Commission for sending a shirtless photo of himself to a female court employee[5], cautioned Ms. Mott to keep the affair quiet:

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[4] In one such text, Defendant McCree told Mott "Oh yeah, I text from the bench. After last nite, its all I can do not 2 jerk off 'under' the bench :-)." (R. 18-5, McCree Answer to JTC Complaint, Pg ID 279-280). In another, he texted:

> C'mon, U'r talking about the 'docket from hell, 'filled w/tatted up, overweight, half-ass English speaking gap tooth skank hoes...and then you walk in.

[5] When he discussed the photograph with local media, Defendant exclaimed: "There is no shame in my game." Defendant consented to a sanction of public censure for breaching the standards of judicial conduct. (R. 18-8, Order from the Michigan Supreme Court, Pg ID 299-302).

> My Judicial Tenure Commission matter has me nervous, as you might expect. I have to be **real** careful until this matter is put to rest. I can only ask humbly for your indulgence. *Sorry. Second, you are a complaining witness on a case that is before me. Naturally, if it got out that we were seeing each other before your B.D.'s [referring to Plaintiff as the "Baby's Daddy"] case closed everybody could be in deep shit.* Why you want to spend time with a man like me remains a mystery, but if you'll have me...then as Bill Withers said, 'use me up!" SMOOCHES.

(Bold in original; Italics added.) (R 18-5, McCree Answer to JTC Complaint, Pg ID 272-273; R. 18-11, *LeDuff: Judge Wade McCree Strike Two,* Pg ID 306-307.)

In anticipation of an August 16, 2012 "review date" to see if Plaintiff was in compliance with the terms of his delayed sentence, McCree and Mott discussed ex parte whether Plaintiff would be tethered or thrown into jail if he wasn't current on his obligations[6]. (R. 18-

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[6] In one text to Mott, McCree writes: "OK, The math will be based on his failures since being placed on probation, but if U'r right, the threat of jail will loosen his purse strings!" Ms. Mott responded: "OK, So let's go with what you proposed...Go to jail (150 days), release upon payment of $1,500. Or get a tether and bring back w/n 30 days $2,5000 or serve 9 months! Bonus: Pay w/n 30 days, remove tether. Now back to us...What are we doing after court Thursday." In another text sent on August 12, 2012 McCree responded to Mott: "I figured if he hasn't come current by his court date, he gets jail 2 pay. If he says he can bring me $$, I'll put him on tether till he brings the receipt 2 FOC or do 'double time'." (R. 18-5, McCree Answer to JTC Complaint, Pg ID 284-285).

6, *Ex-girlfriend Details Affair,* Pg ID 294-296; R. 18-10, *'Shirtless Judge' McCree Allegedly Impregnates Witness, Lets Her Decide Ex's Sentence Allegedly Impregnates Witness, Lets Her Decide Ex 's Sentence,* Pg ID 304-305; R. 18-5, McCree Answer to JTC Complaint, Pg ID 256-293, at 264-265).

At the August 16, 2012 proceeding, McCree helped Ms. Mott smuggle her cell phone into court contrary to security regulations so the two could covertly discuss by text messaging Plaintiff's case while McCree reviewed it. (R.18-10, *"'Shirtless Judge' McCree Allegedly Impregnates Witness, Let's Her Decide Ex's Sentence",* Pg ID 304-305; R. 18-3, JTC Complaint, Pg ID 196; R. 18-5, McCree Answer to JTC Complaint, Pg ID 267-268). At this hearing, McCree ordered that Plaintiff be placed on an electronic tether until he paid Mott the money she and McCree had agreed upon. (R. 1, Complaint, Pg ID 1-11; R. 18-5, McCree Answer to JTC Complaint, ID 264-265, 269-270). After the hearing, Defendant and Mott met in McCree's judicial chambers and had sexual intercourse. (R. 1, Complaint, Pg ID 5; R. 18-11, *LeDuff: Judge Wade McCree Strike Two,* Pg ID 306).

On September 18, 2012, McCree told Mott he was going to transfer the case to another judge. After the transfer, he texted Mott:

> DONE DEAL!!!-). I told a story so well, I had me believe it!!! Brother King is on his way to the 2

(R. 18-10, *'Shirtless Judge' McCree Allegedly Impregnates Witness, Lets Her Decide Ex's Sentence,* Pg ID 304-305).

> 'hangin' Judge Callahan. He fuck up Once & he's through!!

(R. 18-5, McCree Answer to JTC Complaint, Pg ID 270).

On or about November 1, 2012, Mott told McCree she was pregnant with his child[7]. (R. 1, Complaint, Pg. ID 6; R. 18-5, McCree Answer to JTC Complaint, Pg ID 273). McCree wanted Mott to abort the pregnancy but Mott was reluctant. (R. 18-11, *LeDuff: Judge McCree Strike Two*, Pg ID 307[8]).

As their relationship deteriorated, McCree, unlike most any other aggrieved citizen, personally met with the Prosecuting Attorney for Wayne County (Kym Worthy) and made a false report for "stalking/extortion" possibly implicating Michigan criminal statute MCL 750.411a. (R. 1, Complaint, Pg ID 6-7; R. 18-3, JTC Complaint, Pg ID 200). On December 6, 2012, after she learned of McCree's failed

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[7] McCree testified: "It was very entertaining, very satisfying at the beginning, and it faded and then like a ball off the edge of the table it went very poorly in the fall. It went from a summer romance to an absolute fall out." (R. 18-4, *Judge Wade 'king of latex' McCree's Testimony in Judicial Misconduct Trial,* Pg ID 255).

[8] McCree texted Mott: "YEAH LET'S TALK!!! I WANT (AND SO DOES LAVERN) THIS TERMINATION. U'LL GET WHATEVER YOU WANT 4 IT! I'VE BEEN CLEAR ON IT SINCE THE GET GO!!!

Mott responded: "O NO... U ACT LIKE I'M HOLDING THIS OVER U...YOU ASKED ME 2 GET THE ABORTION TO HELP IN YOUR DIVORCE CASE."

(*Id.*) (Upper case in originals).

effort to have her arrested and criminally charged, Mott aired the affair and her discussions with McCree about Plaintiff's case on local news. (R. 1, Complaint, Pg ID 7; R. 18-3, JTC Complaint, Pg ID 199; R. 18-11, *LeDuff: Judge Wade McCree Strike Two,* Pg ID 306-307).

B. The Complaint and Defendant's Motion for Summary Judgment:

On February 11, 2013, pursuant to 42 USC § 1983, Plaintiff filed his civil rights Complaint against McCree and Mott. (R. 1, Complaint, Pg ID 1-11). As to McCree, Plaintiff alleged that he intentionally exploited the powers, promise and prestige of his judicial office to initiate, induce, cultivate and continue the illicit relationship with Ms. Mott at the expense of Plaintiff's *Fifth* and *Fourteenth Amendment* due process rights. (*Id.* at Pg ID 1-4, 7-10). Plaintiff alleged that McCree engaged in a series of non-judicial acts under color of state law which deprived Plaintiff of his fundamental due process rights to a fair, unbiased and neutral judge. *(Id)* Plaintiff also alleged that McCree and Mott conspired to deprive him of his federally protected rights. (*Id.* at Pg ID 9-10).

Before the party's commenced discovery, McCree filed a motion for summary judgment which argued that absolute judicial immunity insulated him from liability for any alleged civil rights violation. (R. 15, Def.'s MSJ, Pg ID 45-69). Plaintiff filed his response and argued that McCree could not avail himself of judicial immunity because he engaged in a series of non-judicial acts while acting under color of state law which violated Plaintiff's federal due process rights to a fair and impartial judge. (R. 18, Pl.'s Resp. to MSJ,

Pg ID 150-177). The District Court disagreed and dismissed Plaintiff's claims against McCree[9]. (R. 22, Memo and Order, Pg ID 382-393).

In its Memorandum, the District Court explained that dismissal was warranted because McCree's "purported[10] nonjudicial actions" had nothing to do " . . . with [Plaintiff]; they involved McCree and Mott. King's § 1983 claims cannot, as a matter of law, be based on actions taken by McCree that did not directly involve King." (*Id.* at Pg ID 387). The District Court also found that "even if King could state a § 1983 claim against McCree for the above acts, none of the specific acts involved McCree acting under "color of state law." (*Id.* at 388).

Plaintiff timely filed his Notice of Appeal. (R. 25, Notice of Appeal, Pg ID

SUMMARY OF ARGUMENT

The District Court's analysis is erroneous as matter of law and fact. The *Fifth* and *Fourteenth Amendments* guaranteed Plaintiff the most basic element of due process–the right to a fair, impartial and neutral judge. Appellee-McCree robbed him of those rights. McCree's sexual affair with Mott, his discussions with her about

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[9] The District Court did not dismiss the conspiracy claim against Mott. Plaintiff agreed to dismiss his claim against Mott prejudice. (R. 27, Stip. Dismissal as to Mott, Pg ID 400-401).

[10] The District Court's use of the word "purported" is inaccurate. McCree admitted to the non-judicial acts cited by Plaintiff, the most significant of which were McCree and Mott's sexual relationship and their communications about Plaintiff's case. (R. 18-5, McCree's Answer to JTC Complaint, Pg ID 260-268).

how to make Plaintiff pay her money, and every extrajudicial communication between the two, directly deprived Plaintiff of due process. Of this, there can be no doubt.

In addition, it was precisely McCree's status as the state court judge assigned to the *King* case that empowered him to initiate, induce and maintain the affair with Mott for his personal gratification at the expense of Plaintiff's constitutional rights. It is axiomatic that a judge's fealty to the Constitution does not end when he leaves the courthouse or is outside the presence of a party. Whether on the bench or off, in public or in private, a judge is a state actor whenever the due process rights of a litigant before him are implicated[11].

Accordingly, this Court should reverse the decision of the District Court and remand this matter for trial.

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[11] This notion is captured in Canon 2(A) of the Michigan Code of Judicial Conduct:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety or the appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen but should do so willingly.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT McCREE'S EXTRAJUDICIAL SEXUAL ACTIVITY AND COMMUNICATIONS WITH MOTT DID NOT PERSONALLY OR DIRECTLY DEPRIVE PLAINTIFF OF DUE PROCESS.

A. Standard of Review

The availability of absolute judicial immunity in the context of a Rule (12)(b)(6) motion to dismiss presents a question of law, which this Court reviews de novo. *Paige v. Coyner,* 614 F.3d 273, 277 (6th Cir. 2010); *Archie v. Lanier,* 95 F.3d 438, 440 (6th Cir. 1996). As the proponent of the claim of absolute judicial immunity, McCree bears the burden of showing that such immunity is warranted. *Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 432 (1993); *Buckley v. Fitzsimmons,* 509 U.S. 259, 269 (1993); *Burns v. Reed,* 500 U.S. 478, 486 (1991).

B. 42 USC § 1983 and Absolute Judicial Immunity:

Under 42 U.S.C. § 1983, "'every person' who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.'" *Imbler v. Patchman*, 424 U.S. 409, 417 (1976). A claim under 42 U.S.C § 1983, requires the plaintiff to allege two elements: (1) the defendant acted under color of state law; and (2) the defendant's conduct deprived the plaintiff of rights

secured under federal law. *Fritz v. Charter Twp. Of Comstock,* 592 F.3d 718, 722 (6th Cir. 2010).

Despite § 1983's broad terms, the Supreme Court has consistently held that § 1983 did not abolish long-standing common law immunities and defenses to civil suits. *Burns,* 500 U.S. at 478.

Judges enjoy judicial immunity from suits arising out of the performance of their judicial functions. *Pierson v. Ray,* 386 U.S. 547, 553-54 (1967). This is so even where there are allegations of corruption, malice or bad faith[12]. *Id*. 554; see also, *Mireles v. Waco,* 502 U.S. 9, 11 (1991). This far-reaching protection serves to ensure that independent and impartial exercise of judgment is not impaired by exposure to potential damages and the judge is "... free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 347 (1871); *Barnes v. Winchell,* 105 F.3d 1111, 1115 (6th Cir. 1997).

However, judicial immunity "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Matteo,* 360 U.S. 564, 572-73, (1959). The Supreme Court has made it clear that the doctrine of immunity should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose. See, *Doe v. McMillan*, 412 U.S. 306, 319-325 (1973).

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[12] Plaintiff's Complaint is not predicated upon allegations, gossamer or otherwise. Instead, it is based upon a litany of undisputed facts.

Judicial immunity may be overcome in two situations: (1) when the conduct alleged is not performed in the judge's judicial capacity; or (2) when the conduct alleged although judicial in nature is taken in complete absence of all jurisdiction. *Mireles,* 502 U.S. at 11-12. Plaintiff does not argue that McCree lacked jurisdiction nor does he challenge McCree's rulings from the bench. Instead, Plaintiff argues that McCree engaged in thousands of non-judicial acts each of which deprived Plaintiff of his fundamental due process right to a fair, unbiased and neutral judge guaranteed in the *Fifth* and *Fourteenth Amendments.*

The determination of whether an act is performed in one's judicial capacity depends on the "nature" and "function" of the act, not on the act itself. *Mireles,* 502 U.S. at 13; *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). Looking first to the "nature" of the act, the Court must determine whether the conduct giving rise to the claim is a function generally performed by a judge. *Stump,* 435 U.S. at 362. This inquiry does not involve a rigid scrutiny of the particular act in question, but rather requires only an overall examination of the judge's alleged conduct in relation to general functions normally performed by judges. *Mireles,* 502 U.S. at 13.

Second, in determining whether an act is "judicial," this Court must assess whether the parties dealt with the judge in his or her judicial capacity[13]. *Id.* at 12. In

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[13] This Circuit has explained:

> The analytical key "in attempting to draw the line" between functions for which judicial immunity attaches and those for which it does not is the determination whether the questioned

examining the functions normally performed by a judge, the Sixth Circuit has "recognized that 'paradigmatic judicial acts,' or acts that involve resolving disputes between parties who have invoked the jurisdiction of a court, are the touchstone for application of judicial immunity. [Citations omitted] The 'touchstone' for judicial immunity, then, has been the 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'" *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 n. 8 (1993) (citing *Burns v. Reed*, 500 U.S. at 500). When that function is not implicated, the protection of absolute immunity is not justified. *Burns*, 500 U.S. at 486.

Whenever an action taken by a judge is not an adjudication between the parties, it is less likely that it will be deemed "judicial." *Brookings v. Clunk,* 389 F.3d 614, 618 (6th Cir. 2004) citing *Barrett v. Harrington,* 130 F.3d 246, 255 (6th Cir. 1997) (no judicial immunity for defamatory statements to the media); *Cameron v. Seitz,* 38 F.3d 264, 271 (6th Cir. 1994) (judicial immunity for judge's courtroom conduct.) Here, the parties agree that McCree's sexual relationship and extrajudicial communications with Mott were non-judicial.

> activities are "truly judicial acts" or "acts that simply happen to have been done by judges." It is the *nature* of the function involved that determines whether an act is "truly" judicial. (Emphasis in original)

Sparks v. Character and Fitness Comm. of Kentucky, 859 F.2d 428, 432 (6th Cir. 1988) (citations omitted), *cert. denied*, 489 U.S. 1011 (1989).

The Supreme Court, for good reason, has "been quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White,* 484 U.S. 219, 224 (1988). Courts have not applied judicial immunity in § 1983 actions where the judge exploited his office and engaged in non-judicial acts for sexual gratification or personal gain. *See, Archie, supra; Ha1per v. Merckle,* 638 F.2d 848 (5th Cir. 1981); *Lopez v. Vanderwater,* 620 F.2d 1229 (7th Cir. 1980).

C. Due Process and the Role of the Judge:

The Constitution's *Due Process Clause* guarantees litigants a right to have their cases heard and decided by a fair and impartial judge. U.S. CONST. amends. V, XIV. The notion of an impartial, unbiased judge is the cornerstone of our system of justice; without it there is no justice[14]. A judge's partiality for one party over another, regardless of the reason, taints not only that particular proceeding, but the entire judicial system, reducing public confidence in the courts. See, *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring.)

The Supreme Court, in *In re Murchison*, 349 U.S. at 136, explained the solemnity of due process and judicial impartiality:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our

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[14] The Massachusetts Constitution captures this principle: "He shall know nothing about the parties and everything about the case. He shall do everything for justice and nothing for himself, his patron or his sovereign." Mass. Const. 1833.

> system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and accused, denies the latter due process of law." (Citing *Tumey v. Ohio*, 237 U.S. 510, at 532 (1927.)

See, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 835 (1986) (due process violated and disqualification mandated where "direct, personal [and] substantial" influences on judge involved.)

Recognizing that a judge could easily deny any subjective motive tending toward bias (as Appellee does here), the Supreme Court in *Caperton, supra,* formulated an objective test to determine when a judge's potential for partiality violated due process: "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881; See also, 556 U.S. at 879, 882-883[15]. The *Caperton* Court held that "In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's

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[15] See also, *Aetna Life Ins. Co.,* 475 U.S. at 835 ("We make clear that we are not required to decide whether in fact Justice Embry was influenced....")

determination respecting actual bias, the *Due Process Clause* has been implemented by objective standards that do not require proof of actual bias." *Id.* at 883; see also, *Making Appearance Matter: Recusal and Appearance of Bias,* D. Bam, BYU Law Review (2011), 943-2011.

D. Plaintiff was the Victim and Suffered a Direct Injury as a Result of McCree's Constitutional Tort.

The District Court found that the non-judicial acts identified by Plaintiff were not direct or personal to him to be actionable under § 1983:

> Unfortunately for King, none of the acts he complains[16] involved McCree dealing with him; they

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[16] In his Response to Defendant's Motion for Summary Judgment, Plaintiff noted the following non-judicial acts perpetuated by McCree:

> It was not a judicial act to flirt with Ms. Mott from the bench when he first saw her on May 21, 2012. It was not a judicial act to pursue her in the courtroom. It was not a judicial act to engage in *ex parte* contact and give her his judicial business card with instructions to contact him[16]. It was not a judicial act to have a lunch date with Ms. Mott on May 30, 2012. It was not a judicial act to have sex repeatedly with Ms. Mott, including in judicial chambers. It was not a judicial act to text Ms. Mott from the bench about his desire to "jerk off." It was not a judicial act to allow Ms. Mott to take up residence at his deceased mother's Ann Arbor home. It was not a judicial act to give Mott $6,000. It was not a judicial act when he and Ms. Mott secretly discussed using the threat of jail to "loosen [Plaintiffs] purse strings." It was not a judicial act to instruct Mott to keep their affair quiet while he presided over *King,* lest Defendants find themselves in "deep shit". All of these acts,

> involved McCree and Mott. King's § 1983 claims cannot, as a matter of law, be based on actions taken by McCree that did not directly involve King. Indeed, '[a] § 1983 cause of action is entirely personal to the direct victim of the alleged constitutional court. *Carmichael v. City of Cleveland,* 881 F. Supp. 2d 833, 844-45 (Ohio ED 2012) (citing Jaco *v. Bloechel,* 739 F.2d 239, 241 (6th Cir. 1984); *Claybrook v. Birchwell,* 199 F.3d 350, 357 (6th Cir. 2000)) Thus, '[n]o cause of action lies under § 1983 for collateral injuries suffered personally by another." *Id.* (citation omitted).

(R. 22, Memo and Order, Pg ID 387-388).

The District Court may have accurately articulated the law, however. It failed in its analysis and application. The constitutional guarantee of due process required McCree to remain neutral, fair and unbiased. *In re Murchison*, 349 U.S. at 136 citing *Tumey,* 237 U.S. at 532. Under *In re Murchison* and its spawn, Plaintiff was personally and directly deprived of this guarantee every time McCree and Mott engaged in any extrajudicial contact. Plaintiff's due process rights were violated when McCree and Mott had sex in chambers and elsewhere, when they spent time together outside the courtroom, discussed and decided how to sentence Plaintiff for his late child support

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> and others, violated Plaintiff's basic due process right to a fair, neutral and impartial judge. See e.g., *Caperton, supra* and *Tumey, supra.* These were not "paradigmatic judicial acts" or functions normally performed by a judge to justify judicial immunity. *Stump,* 435 U.S. at 362.

(R. 18, Pl.'s Resp. to MSJ Pg ID 170-171.)

payments. Plaintiff, therefore, was *the* victim of McCree and Mott's extrajudicial activity and suffered injuries direct and personal to him actionable under § 1983[17].

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT APPELLEE McCREE WAS NOT ACTING UNDER COLOR OF STATE LAW WHEN HE BECAME SEXUALLY INVOLVED WITH MOTT DURING THE PERIOD HE PRESIDED OVER PLAINTIFF'S CASE.

The District Court ruled that "... even if King could state a § 1983 claim against McCree for the above acts, none of the specific acts involved McCree acting under "color of state law. *West v. Atkins,* 487 U.S. 42, 48 (1988)." (R. 22, Memo and Order, Pg ID 388.) The District Court explained:

> McCree's relationship with Mott was personal. McCree's private pursuit of Mott was not "under color of state law" solely because of his status as a judge. He was not "acting in his official capacity or ...exercising his [official] responsibilities pursuant

[17] The District Court's view of McCree and Mott's relationship was oddly myopic. This illicit affair did not take place in a vacuum. McCree was sexually, emotionally and economically invested in Mott during the entire period he presided over Plaintiff's case. The District Court glossed over the admitted fact that McCree and Mott discussed what to do with Plaintiff at his August 16, 2012 "review date." As a matter of law he could not be fair, detached and unbiased. See, *Tumey, supra, In re Murchison, supra* and *Caperton, supra.*

> to state law" when he pursued a personal relationship with Mott. *Id.* at 50 (citing *Parrat v. Taylor*, 451 U.S. 527, 535-36 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 147 n. 5 (1978)). Although McCree was acting under color of state law when he presided over King's child support case, he was not similarly doing so in his personal relationship with Mott[18].

Id. at 388.

The District Court erred as a matter of law. It was *precisely* because of McCree's "status" as judge which enabled him to initiate and fuel the sexual affair with Mott. As the presiding judge, McCree could compel Plaintiff to pay Mott the money she wanted-an act which could only be accomplished by a state actor. McCree invited Mott' s input on how he should sentence Plaintiff when he was late with his child support payments. In exchange, Mott provided McCree with sex as she did in chambers on August 16, 2012, after McCree placed Plaintiff on an electronic tether. McCree, therefore, acted under color of state law when he used his position as the presiding judge to satisfy his sexual desire.[19]

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[18] The District Court found that the only actions taken by McCree that directly involved King were actual court proceedings and where McCree finally reassigned the case to another judge. *Id.* at 388-389.

[19] In *Tumey,* the Supreme Court prohibited a judge from sitting on his own case because it violated due process. 273 U.S. at 579. This is, in essense, what McCree was doing in Plaintiff's case. McCree had a personal stake in the outcome.

In *Archie, supra*, this Court refused to apply judicial immunity to a state court judge who used his position as the presiding judge over juvenile, divorce and custody cases to coerce female litigants for sex. The *Archie* plaintiffs sued the judge under § 1983 for the violation of their *Fourteenth Amendment* due process rights. The *Archie* majority affirmed the district court's denial of judicial immunity because the defendant's acts were "non-judicial" and he was a state actor. *Id* at 441[20]. See also, *Lopez,* 620 F.2d at 1235-1237 (no absolute judicial immunity in a § 1983 suit against a judge who violated his former tenant's due process rights by, among other things, prejudging his case[21].)

The District Court gave short shrift to *Archie, Lopez* and the other cases which refused to apply judicial immunity to judges who violated a citizen's civil rights[22]. The District Court explained: "In these cases,

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[20] Plaintiff perceives no way to distinguish *Archie v. Lanier*. In the context of the totality of facts there is no significant difference between coerced and uncoerced sex. Indeed, Defendant Mott may claim that she was extorted and coerced by Defendant McCree using his position as judge presiding over her case.

[21] Citing *In re Murchison, supra, Tumey, supra, United States v. Sciuto*, 351 F.2d 842, 844-46 (7th Cir. 1976) and *United States v. Grinnell Corp*., 384 U.S. 563, 583 (1966).

[22] Plaintiff also cited *King v. Love*, 766 F.2d 962 (6th Cir. 1985), where the Sixth Circuit rejected judicial immunity in a § 1983 action where a state court judge deliberately mislead police officers to alter an arrest warrant for an innocent person scheduled to testify against the judge at a grievance hearing[22]. *Id* at 968. *Harper v. Merckle*, 638 F.2d 848, 854 (5th Cir. 1981) (the Fifth Circuit Court of Appeals refused to apply judicial immunity to a judge who ordered a non-custodial father arrested and incarcerated after he

the judges were performing actions not normally performed by a judge. This is not the case here; McCree's actions in presiding over King's child support case were clear judicial actions." As noted above, Plaintiff does not challenge his plea agreement or sentence. Plaintiff's due process rights to a fair and unbiased judge were violated by McCree's extrajudicial relationship with Mott. See, *In re Murchison,* 349 U.S at 136; *Caperton,* 556 U.S. at 883-884[23]. The District Court misunderstood Plaintiff's claim and, therefore,

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dropped off a child support check for his ex-wife who worked as a secretary at the courthouse, refused to take an oath in the judge's chambers concerning his address and bolted from the courthouse.) The Ninth Circuit, in *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), declined to apply judicial immunity to a judge who used physical force to personally evict someone from his courtroom.

[23] In *Caperton,* 556 U.S. at 883-884, the Court noted:

> In defining these standards the Court has asked whether "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." [citation omitted]

The *Caperton* Court, 556 U.S. at 887, also explained:

> It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that extreme cases are most likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated.

misapplied the law to the relevant facts[24]. Accordingly, this Court should reverse.

SUMMARY AND RELIEF REQUESTED

The District Court reversibly erred when it determined that McCree's extrajudicial activities with Mott had nothing to do with Plaintiff. It reversibly erred when it found that McCree was not acting under color of state law when he pursued and maintained his extrajudicial relationship with Mott. These findings defied well settled law and ignored human nature.

Affording McCree judicial immunity under these most exceptional, egregious and obscene circumstances does nothing to preserve the sanctity of independent, fearless judicial decision-making. McCree, therefore, may not avail himself of judicial immunity to avoid civil liability under § 1983 for his constitutional torts. This Court, therefore, should reverse the District Court's dismissal of Plaintiff's claims against McCree and remand this matter for trial.

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[24] The District Court's misunderstanding is reflected in the cases it relied upon. *West* involved a suit by an inmate against a prison physician for violation of his *Eight Amendment* rights. *Parrat* involved an inmate's due process claim against prison officials who lost a mail order hobby kit. *Flagg Bros.* involved a due process claim related to a warehouseman's sale of furniture for non-payment. *Adickes* involved a teacher who sued a restaurant who refused to serve her based on race. None of these cases involved a judge whose constitutional obligation to litigants extends to his public and private conduct. See, *Tumey, supra* at 523; *In re Murchison, supra* at 136; 28 U.S.C. § 455; ABA Model Code of Judicial Conduct (2011), Canons 1 and 3; MCR 2.303(8); Michigan Code of Judicial Conduct, Canon 1, A.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 6,501 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on January 21, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiff-Appellant, per Sixth Circuit Rule 28(c), 30(b), hereby designates the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No.
Complaint	2/11/2013	R. 1	1-11
Def.'s MSJ	4/25/2013	R. 15	45-69
Pl.'s Resp. to MSJ	6/05/2013	R. 18	150-177
JTC Complaint	6/05/2013	R. 18-3	193, 200
Judge Wade "king of latex" McCree Testifies at Misconduct Trial	6/05/2013	R. 18-4	253-255
McCree Answer to JTC Complaint	6/05/2013	R. 18-5	193, 256-293
Ex-Girlfriend Details Affair	6/05/2013	R. 18-6	294-296
Affair With Witness Clouded My Judgment	6/05/2013	R. 18-7	297-298
Order from the Michigan Supreme Court	6/05/2013	R. 18-8	299-302

Michigan Judge Testified He Gave Mistress $6,000	6/05/2013	R. 18-9	303
"Shirtless Judge" McCree Allegedly Impregnates Witness, Lets Her Decide Ex's Sentence	6/05/2013	R. 18-10	304-305
LeDuff: Judge Wade McCree Strike Two	6/05/2013	R. 18-11	306-307
Memo and Order	7/26/2013	R. 22	382-393
Notice of Appeal	8/01/2013	R. 25	395-398
Stip. Dismissal as to Mott	8/14/2013	R. 27	400-401